RECOGNITION OF FOREIGN ARBITRAL AWARDS SET ASIDE IN THE COUNTRY OF THEIR ORIGIN

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ABSTRACT

World-wide recognition and enforcement of foreign arbitral awards represent one of the effective achievements of international community. Despite the general deference to arbitral awards on enforcement avenues of member states of New York Convention, sovereign jurisdictional powers of the countries of origin of awards give raise the issue of international effectiveness of annulled foreign arbitral awards. The foregoing thesis will analyze general international legal framework enshrined under New York, Geneva and Inter-American Conventions and the practice of United States and the Netherlands in treatment of vacated foreign arbitral awards in order to identify the review criteria appropriate for the courts in the jurisdictions exercising discretionary power granted under Article 5.1(e) of New York Convention to recognize vacated awards.

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LIST OF ABBREVIATIONS

ARB.	Arbitration
Art.	Article
Aust.	Austria
Bankr.	Bankruptcy
Brit.	British
CA	Cour d'appel (Court of Appeals) [Fr.]
C.L.J	Cambridge Law Journal
Co.	Company
Com.	Commercial
Comp.	Comparative
C.P.C.	Code de Procédure Civile (Code of Civil Procedure) [Fr.]
D.D.C.	District Court of Columbia
Ed.	Editor/Edition
Eds.	Editors
F.Supp.	Federal Supplement
HoF.	Gerechtshof (Court of Appeals) [Neth.]
ICAC	International Court of Commercial Arbitration of the Moscow Chamber of Commerce
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
Inc.	Incorporated
Int'l	International
J.	Journal
L.N.T.S.	League of Nations Treaty Series
L.Q.	Law Quarterly
N.D.N.Y.	United States District Court for the Northern District of New York
N.D. IL	United States District Court for the Northern District of Illinois
NY	New York
OAO	Открытое акционерное общество (Open Joint Stock Company) [RF]
OGH	Oberster Gerichtshof (Supreme Court) [Aust.]
OJSC	Open Joint Stock Company
Rb.	Arron dissements rechtbank (Court of First Instance) [Neth.]
Rev.	Review
S.a.r.l.	Société à responsabilité limitée (Limited Liability Company) [Fr.]
S.C.C.	Supreme Court Cases, India
S.D.	Southern District
S.p.A	Sociedad por acciones (Joint Stock Company) [Col.]
TF	Tribunal Fédéral (Federal Supreme Court) [Switz.]
TGI	Tribunaux de grande instance (Ordinary Court of Original Jurisdiction) [Fr.]
UNCITRAL	United Nations Commission on International Trade Law
U.N.T.S.	United Nations Treaty Series

U.S.D.C.	United States District Court
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated (WestLaw)
U.S.C.S.	United States Code Service (Lexis)
U.S.S.R.	Union of Soviet Socialist Republics
US	United States of America
VAS	Vysshii Arbitrazhnii Sud RF (Highest Arbitration Court of the Russian Federation)
Vol.	Volume
Y.B.	Yearbook

INTRODUCTION

International dispute resolution represents inseparable part of international business relations in modern world. Out of the options available for parties acting on international business avenues, commercial arbitration became the most popular mean for settlement of international disputes mainly because of the level of flexibility and control over the process available for the parties.[1] Despite the value of extended party autonomy, speedy resolution and freedom to select arbitrators count as the major incentives for submitting dispute to arbitration, availability of international legal framework for recognition and enforcement of foreign arbitral awards is the advantage international businessmen are very attracted to enjoy. [2]

Necessity for guaranteeing world-wide recognition of arbitral awards resulted in enactment of Convention for Recognition and Enforcement of Foreign Arbitral Awards. [3] In 1958, representatives of world governments signed the treaty establishing the universal deference to foreign arbitral awards qualifying the minimum formal requirements in search for recognition outside of country of origin. [4] The idea of world-wide recognition of arbitral awards in line with the need to exclude awards in breach of major procedural or substantive safeguards is enshrined in Article 5 of NY Convention. The provision limited the grounds for refusing

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1 CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF, MATTHIAS SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 29 (2006); *see also* Mark L. Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 423 (2008).

2 Bühring-Uhle, *supra* note 1, at 66-67.

3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38 [hereinafter NY Convention].

4 Herbert Kronke, *Introduction: The New York Convention Fifty Years on: Overview and Assessment*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 1-2 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola C. Port eds., 2010).

recognition of foreign arbitral awards to five deficiencies of award exercisable by opposing party and two conditions enforcing courts are authorized to examine ex officio. [5]

NY Convention not only enumerated the grounds for refusing enforcement of foreign arbitral awards, but also saved the room for enforcing courts to disregard existence of the grounds and grant enforcement based on the residual discretionary power implied from use of word "may" in the chapeau of Article 5.1. Despite the extent and limits of the discretion is widely debated among legal scholars, [6] courts in many jurisdictions have largely found and exercised the power to recognize arbitral awards suffering from the deficiencies enlisted in the Convention. [7]

Apart from limiting power of contracting states to decide on enforceability of awards coming from foreign jurisdictions, Article 5.1 of NY Convention also acknowledges authority of court in country of origin to set the arbitral awards aside and determines the place of annulment judgments by enlisting local annulment as one of the grounds for refusing recognition under Article 5.1(e). [8] Since the provision deals with the effects of annulment judgments within the Convention system, the issue of residual discretion discussed above in case of existence of vacating decisions is widely debated. [9]

The border line triggering debate lies on the understanding of role of country of situs in international commercial arbitration. [10] While supporting the idea of delocalized awards results in opposition to international effectiveness of annulment judgments, recognition of sovereign power of country of origin hosting international arbitration determines award as

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5 NY Convention art. 5.1-2.; Patricia Nacimiento, *Commentary on Article 5(1)(a), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 207 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola C. Port eds., 2010).

6 Bühring-Uhle, *supra* note 1, at 59.

7 Nacimiento, *supra* note 5, at 207-09.

8 Nadia Darwazeh, *Commentary on Article 5(1)(e), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 319 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola C. Port eds., 2010).

9 *Id.* at 308-09.

10 *Id.* at 326.

part of legal order of that country and calls for world-wide nullifying effect of setting aside decisions. [11] Seeking for balanced position granting adequate deference to courts of country of origin and international character of arbitral awards, part of commentators stands for presumption of unenforceability of vacated awards rebuttable in case of insignificance violations triggering application of grounds for setting aside or failure of the party to timely invoke the ground in arbitral proceedings. [12]

The difficulties related to the text of Article 5.1(e) resulted in inconsistent application of the provision in different member states trying to avoid ambiguity of the language of Convention either by regulating the issue on domestic level [13] or execution of international instruments solving the dilemma. [14]

Understanding the need for identifying current trends and progress made by international commercial arbitration practice in treatment of foreign vacated arbitral awards, the foregoing thesis present a study of application of Article 5.1(e) in selected jurisdictions to elaborate the appropriate approach for deciding the issue of recognition and enforcement of annulled awards.

In order to establish legal framework for recognition of vacated arbitral awards, this thesis will start with overview of legal environment created by NY Convention as the most widely accepted instrument on recognition of foreign arbitral awards in the world (Chapter I). Determination of regime provided by NY Convention will be a sufficient ground for

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11 Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 19 (1999) *available at:*http://www.shearman.com/files/Publication/636bdd1f-63a2-4959-b38d-088c3023cdaa/Presentation/PublicationAttachment/d437470a-4fe0-405d-b241-0cbc1c3f1f01/IA_Enforcement%20of%20Awards%20Set%20Aside%20in%20Country%20of%20Origin_040308_02.pdf (last visited Mar. 26, 2013).

12 Van den Berg, *infra* note 38.

13 CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1502 (Fr.) *translated in* JAN PAULSSON, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Suppl. no. 58, 1-12; Hilmarton Ltd. v OTV, Cour d'appel [CA] [Regional Court of Appeal] Paris, 1 ch., Dec. 19, 1991 *in* 19 Y.B. COM. ARB. 655, 655 (Albert van den Berg ed., 1994).

14 European Convention on International Commercial Arbitration [hereinafter Geneva Convention] art. 9.1, Apr. 21, 1961, 484 U.N.T.S. 349.

analyzing how Geneva Convention coped with the issue in Europe (Chapter II). Once the legal basis is discussed, we will overview statutory and case law of the United States in search for review criteria appropriate to US courts adjudicating enforceability of foreign vacated arbitral awards (Chapter III). Lastly, the thesis will describe two recent cases involving arbitral awards set aside in the Russian Federation and brought for enforcement in the Netherlands to demonstrate Dutch perspective in the system of application of Article 5.1(e) of NY Convention (Chapter IV).

CHAPTER 1. LEGAL FRAMEWORK FOR ENFORCEMENT OF ANNULLED FOREIGN ARBITRAL AWARDS UNDER NEW YORK CONVENTION

NY Convention represents the major source for recognition of annulled arbitral awards world-wide. The present chapter will firstly discuss scope and application of Article 5.1(e) (sect. 1.1.) and then describe the role of Article 7 of the Convention in enforcement of vacated arbitral awards (sect. 1.2.).

1.1. Scope and application of Article 5.1(e) of New York Convention

1.1.1. Competent authority to set aside foreign arbitral awards under Article 5.1(e) of New York Convention

According to Article 5.1(e) of NY Convention, the annulment of arbitral award by " . . . competent authority in the country in which, or under the law of which the award was made" may serve as a ground for refusal of recognition and enforcement. Article 5.1(e) establishes two possible jurisdictions authorized to set aside an arbitral award: jurisdiction of seat of arbitration and jurisdiction of the law applicable to the award, but it is observed that mostly, annulment decisions come from the country of seat of arbitration. [15] The article does not expressly determine whether it is substantive or procedural law applicable to the dispute that grants authority for annulment of award. The ambiguity of language of NY Convention generated court decisions over the world determining that only procedural law governing proceedings can trigger such an authority. [16]

One of the notable decisions on the issue of type of law inferred in Article 5.1(e) was rendered by the United States District Court of Southern District of New York (hereinafter S.D.N.Y.) in *International Standard Electric v. Bridas Petrolera Industrial y Comercial*. [17]

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[15] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 350 (1981).

[16] RICHARD B. LILLICH & CHARLES N. BROWER, INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 185 (1992).

[17] International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera Industrial y Comercial, 745 F.Supp. 172 (S.D.N.Y. 1990).

Deciding on jurisdiction to set aside arbitral award made in Mexico, judge clarified that despite the law of New York was governing substance of the dispute, applicability of Mexican procedural law to arbitral proceedings was determinative in granting primary jurisdiction over the award to Mexican courts under Article 5.1(e). [18]

Despite the overall consensus on the type of law implied in Article 5.1(e), coverage of two possible scenarios referred above resulted in unclear formula for determining competent authority in case of existence of two distinct jurisdictions mentioned in the provision. [19] The problems relating to the deficiency of language was highlighted in the decision of the Supreme Court of India in *National Thermal Corp. v. Singer Corp*. [20] In this case, court recognized jurisdiction to set aside ICC interim award rendered in London and governed with English procedural law based on the applicability of Indian substantive law to the dispute. [21]

Apart from the difficulties raised by the wording, Article 5.1(e) grants losing party of arbitration higher degree of flexibility with the option to seek annulment of the award in the country of situs and country of procedural law governing proceedings at the same time. [22] Introduction of the possibility by NY Convention was assessed as a "retrograde" compared to 1927 Geneva Convention on Execution of Foreign Arbitral Awards (hereinafter 1927 Geneva Convention), [23] which determined the place of arbitration as a sole jurisdiction authorized for primary review over an arbitral award. [24] In fact, the primary draft of the NY Convention did not include applicable law as an additional source of authority to set aside award, but as a result of effort of the representatives of the USSR and Norway, Article 5.1(e) was modified

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18 *Id.* at 179.

19 HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD ¶ 173 (2002).

20 National Thermal Corp. v. Singer Corp., (1992) 3 S.C.C. 551 (India), *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=12384 (last visited Mar. 26, 2013).

21 *Id.* ¶ 16.

22 ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE ¶ 12.14 (2005).

23 Geneva Convention on the Execution of Foreign Arbitral Awards, Sep. 26, 1927, 92 L.N.T.S. 301.

24 1927 Geneva Convention art. 1(d); *see* Gharavi, *supra* note 19, ¶ 170.

in the manner to include the second criteria as well. [25] The motive of the delegates advocating the amendment was to safeguard opportunity for primary review if the court of place of arbitration refused the jurisdiction due to the foreign procedural law governing the dispute. [26]

Analyzing legal scholarship around the issue of competent authority, three possible scenarios steaming from the wording of Article 5.1(e) can be identified. According to the first interpretation, the party seeking enforcement is free to refer to either jurisdiction envisaged under the provision. [27] Second way of understanding the text suggests that in case of conflict of jurisdictions, annulment must be sought in the country under the law of which the award was made. [28] The last theory advocates the joint annulment jurisdiction, when both the countries in which and under the law of which the award was rendered can have primary jurisdiction on setting aside the award. [29]

1.1.2. Issue of discretionary nature of Article 5.1(e)

After overview of the concept of competent authority under Article 5.1(e) of NY Convention, we should now analyze the issue of discretionary nature of the provision. According to Article 5.1 of NY Convention, grounds enumerated in §§ 5.1(a)-(e) "may" serve as grounds for refusal of recognition of foreign arbitral award. The "may" language employed in the provision gives raise issue of whether setting aside of arbitral award obliges or merely authorizes enforcing court to deny recognition. [30]

As the initial point of discussion on legal effect of Article 5.1(e) on enforcement stage, we should have a look in the understanding provided by comparative analyzes of five authentic

[25] Gharavi, *supra* note 19, ¶ 171.
[26] *Id.* ¶ 172.
[27] *Id.* ¶ 303.
[28] Gharavi, *supra* note 19, ¶ 304.
[29] Gharavi, *supra* note 19, ¶ 305.
[30] Darwazeh, *supra* note 8, at 304.

languages of the Convention, such as: English, French, Spanish, Chinese and Russian. [31] As already noted above, English text employs "may" in Article 5.1, clearly inferring to the residual discretion of enforcing courts to decide whether or not recognize award in case of existence of one of the grounds enlisted in §§ 5.1(a)-(e). [32] On the other hand, relevant phrase of French text of Article 5.1 reads as follows: *la reconnaissance et l'exécution de la sentence ne serontrefusées... quesi...* ('recognition and enforcement of the award shall not be refused ... unless ...'). According to Paulsson, use of the future indicative in French suggests that the authors (of the French text) might have had in mind the following un-expressed consequence "*..., auquel cas llesser ont refusées* (..., in which case they shall be refused)". [33] Unlike French version, Russian, Spanish and Chinese languages follow English choice of "may" language and thus, comply with general understanding of discretionary nature of the provision. [34]

Despite the clarity of language of Article 5.1, acceptance of residual discretion of enforcing courts in case of existence of grounds for refusal of recognition is strongly opposed in the legal scholarship. According to Van den Berg, generally accepted rule regarding annulled arbitral awards is impossibility to enforce it afterwards. [35] The idea of mandatory nature of Article 5.1(e) is also strongly advocated by Sanders, referring to the obligation of enforcing judges to deny recognition in case of existence of annulment foreign court judgment. [36] In one of the latest commentaries published on case decided by Gerechtshof Amsterdam (Court of Appeals) in *Yukos Capital v. Rosneft*, [37] Van den Berg identifies only two situations when Article 5.1 should be interpreted as granting residual discretion to enforcing courts:

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31 Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT. 227, 227 (1998).

32 *Id.*; DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS - THE NEW YORK CONVENTION OF 1958, 169 (2011).

33 *Id.* at 228.

34 *Id.* at 229.

35 Albert van den Berg, *Enforcement of annulled arbitral awards?*, 9 ICC BULL. 15, 15 (1998).

36 PETER SANDERS, QUO VADIS ARBITRATION? SIXTY YEARS OF ARBITRATION PRACTICE 414 (1999).

37 Yukos v. Rosneft, *infra* note 230.

insignificant violation triggering one of the grounds or failure of the parties to invoke the ground timely in arbitration proceedings. [38] Van den berg also suggests that Articles 3 and 5.1(e) referring to the "binding" award makes it clear that once the award loses its binding effect as a result of setting aside no obligation to enforce exists. [39]

NY Convention does not provide any guidance for the courts exercising the discretion, neither does it limit the possible grounds for setting aside arbitral awards. [40] The lack of specificity of the Convention may raise the "anathema of local particularities" as referred by Paulsson. [41] Proponents of discretionary meaning of Article 5.1(e) also observe that discretionary nature of wording of Article 5.1(e) may lead to such an extension of the scope of the provision to allow refusal of enforcement of arbitral award set aside on any ground based on the particularities of the country of origin that might undermine the idea of limitation of grounds for refusal under §§ 5.1(e)-(d). [42]

As stated by a former Secretary-General of the ICC Court of Arbitration, allowance for local requirements is a " . . . a hitherto rock-solid rampart against the true internationalization of arbitration, because in the award's country of origin all means of recourse and all grounds of nullity applicable to purely domestic awards may be used to oppose recognition abroad …." [43]

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38 Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam,* Apr. 28, 2009, 27 J. INT'L ARB.179, 186 (2010).

39 *Id.* at 190.

40 *Id.*

41 Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) Under the New York* Convention, 7 AM. REV. INT'L ARB. 99, 99 (1996).

42 Van den Berg, *supra* note 15, at 355.

43 ALAN REDFERN & MARIN HUNGER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 10-42 (3rd ed. 1999).

1.2. Scope and Application of Article 7 of New York Convention

We dedicated the previous section to the analyzes of central provision of NY Convention regulating the destiny of vacated arbitral awards in the system of international recognition and enforcement of foreign arbitral awards. The second provision of the Convention providing access for the parties seeking enforcement of vacated awards to other national and international instruments is Article 7.1, which states:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Despite the fact that new regime of enforcement and recognition is provided, NY Convention enables parties to request recognition based on any other international treaty or domestic law it deems "more favorable". [44] In fact, Article 7.1 regulates the relationship between NY Convention and other treaties as well as the treatment of more favorable treaties and domestic laws. [45] For the purposes of the foregoing thesis, we will discuss the second part – "more favorable rights" provision only.

While the idea of deference to the more favorable legislation is clear, extent of actual opportunities granted by Article 7.1 to the parties seeking of enforcement is debated. One part of the legal scholarship advocates the interpretation of the provision enabling parties to select and rely on the favorable rules of domestic law and NY Convention at the same time. [46] The

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[44] Dirk Otto, *Commentary on Article VII, in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 443, 444, 449 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola C. Port eds., 2010); Redfern & Hunter, *supra* note 43, at 469.

[45] Otto, *supra* note 44, at 446.

[46] Pietro & Platte, *supra* note 32, at 171-72.

other side of the debate supports the idea of full applicability or exclusion of NY Convention resulting in full application of selected law with no possibility to "cherry-pick" the favorable provisions from the Convention. [47] The suggestion is supported by the decision of Arron dissements rechtbank (Rb.) Rotterdam (Court of First Instance) in *Isaac v. Moses.* [48] In this case Dutch court enforced three arbitral awards rendered in Israel based on Book 4 of Wetboek van Burgerlijke Rechtsvordering (Rv.) (Dutch Code of Civil Procedure) (hereinafter Rv.). [49] The court noted that Article 7.1 authorized to enforce arbitral award on the ground of domestic law of the Netherlands "to the exclusion of NY Convention". [50]

The next issue around the scope and application of Article 7.1 relates to the ex officio powers of the court of enforcement jurisdictions as to the reliance of more favorable rights outside of the Convention regime. While French courts systematically apply domestic favorable provisions on their own motion, [51] in Switzerland courts cannot bypass convention unless invoked by the party requesting enforcement. [52]

As concluding points on the scope and application of Article 7.1, we should emphasize role the provision plays in recognition of annulled foreign arbitral awards. To begin with, it is observed that use of mandatory "shall" language of Article 7.1 of NY Convention enables the interested party to overcome discretionary nature of Article 5.1(e) and request enforcement based on the more favorable national or international law applicable in the country where enforcement is sought. [53] Clear example of more favorable rights generated by international

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47 Van den Berg, *supra* note 15, at 85.

48 Isaac v. Moses, Rb. Roterdam, Nov. 24, 1994 *in* 21 Y.B. COM. ARB. 635, ¶ 1 (Van den Berg ed., 1996).

49 Wetboek van Burgerlijke Rechtsvordering (Rv.) (Code of Civil Procedure), enacted on December 1, 1986, English translation is *available at:* http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/ (last visited on Mar. 26, 2013).

50 Isaac v. Moses, *supra* note 48, at 636.

51 Ministry of Public Works v. Société Bec Frères, Cour d'appel [CA] [regional court of appeal] Paris, Febr. 24, 1994 *in* 22 Y.B. COM. ARB. 682, 684 (Van den Berg ed., 1997).

52 Tracomin S.A. v. Sudan Oil Seeds Co. Ltd., Tribunal Federal [TF] [Federal Supreme Court] [Switz.] Nov. 5, 1985 *in* 12 Y.B. COM. ARB. 511, 511 (1987).

53 Pietro & Platte, *supra* note 32, at 333.

convention can be found in Article 9.1 of Geneva Convention. [54] Article 9.1 sets forth the grounds for setting aside of arbitral awards and stipulates that only the annulment decisions which are based on the given grounds are worth of international effectiveness.

On the other hand, commentators do not favor extensive application of Article 7.1 due to the threat of unpredictability and prejudice to the idea of uniform application of the Convention. [55]

[54] Emmanuel Gaillard, *Enforcement of Awards Set aside in the Country of Origin: the French Experience*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA Congress Series 505, 519-521 (Van den Berg ed., 1999); TIBOR VARADY, JOHN J. BARCELO III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 970 (5th ed. 2012).

[55] Otto, *supra* note 44, at 450.

Chapter 2. Legal Framework for Enforcement of Vacated Foreign Arbitral Awards under Regional Arrangements

We discussed NY Convention framework for recognition of vacated arbitral awards in the previous chapter, but the Convention is not the only international instrument regulating the issue. Out of the several regional arrangements dealing with the recognition of arbitral awards, we will analyze Article 9.1 of Geneva Convention, representing European solution of the dilemma.

2.1. Treatment of Vacated Foreign Arbitral Awards under Article 9 of Geneva Convention on International Commercial Arbitration

Geneva Convention was drafted with understanding of the possible complications the above-described discretionary nature of Article 5.1 of NY Convention might have produced in the future. [56] It is narrower in scope compared to NY Convention with application limited to the parties having residence in contracting states. [57]

In this section, we will, first, discuss the destiny of vacated arbitral awards under Article 9.1 of Geneva Convention (sect. 2.1), second, analyze the Convention's scheme solving possible conflicts as to the treatment of annulled awards subject to NY Convention as well (sect. 2.2) and lastly, describe the case of recognition arbitral award set aside in Turkey in the Russian Federation based on Geneva Convention (sect. 2.3).

2.1.1. Enforcement of Annulled Foreign Arbitral Awards under Article 9.1 of Geneva Convention

After three years of adoption of NY Convention, draftsmen of Geneva Convention properly assessed the risks related to the lack of established grounds for setting aside of foreign

[56] WILLIAM LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 667 (2000).

[57] *Id.*

arbitral awards capable of having international effect and limited the authority of enforcing courts in treating the awards set aside in the country of origin. [58] Before describing Geneva Convention regime for vacated arbitral awards, we should emphasize that the Convention was not created to guarantee enforcement of annulled awards. [59] The Convention merely limits the international effectiveness of annulment in one contracting state on the enforcement stage in another contracting state. [60] On the other hand, Article 9 aims to counter the negative effects full deference to setting aside judgments might cause due to the review of the merits of the dispute in the country of origin without further judicial review of the proceedings itself. [61] The provision ensures exclusion of international effectiveness of judgments vacating foreign arbitral awards based on the grounds particular to the specific annulling jurisdictions. [62] The ultimate effect of the provision is that enforcing judge does not grant res judicata power to the judgments setting aside arbitral awards on the grounds other than enumerated through §§ 9.1(a)-(d) of the Convention resembling four grounds included in §§ 5.1(a)-(d) of NY Convention. [63]

Necessity for the clarity for treatment of annulled foreign arbitral awards, provided by Geneva Convention, was shared by the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards (hereinafter the Draft Convention) drafted by Van den Berg. [64] Article 5.3(g) of the Draft Convention limits the international effectiveness of annulment of arbitral awards to the grounds equivalent of Article 5.1(a)-(d)

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58 P. I. Benjamin, *The European Convention on International Commercial Arbitration*, 37 BRIT. Y. B. OF INT'L LAW 478, 493 (1961).

59 CLAUDIA ALFONS, RECOGNITION AND ENFORCEMENT OF FOREIGN ANNULLED ARBITRAL AWARDS 60 (2010).

60 *Id*.; Société Européenne d'Etudes et d'Entreprises (SEEE) v. Socialist Federal Republic of Yugoslavia, Cour d'appel [CA] [regional court of appeal] [Fr.] Rouen, Nov. 13, 1984 *in* 11Y.B. COM. ARB. 491, ¶ 20 (Van den Berg ed., 1986).

61 Alfons, *supra* note 59.

62 Van den Berg, *supra* note 15, at 356.

63 *Id.*

64 Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards* (2008), *available at:* http://www.newyorkconvention.org/userfiles/documenten/draft- convention/65_text.pdf (last visited Mar. 26, 2013).

of NY Convention in the same manner as Article 9.1 of Geneva Convention does. In the Explanatory Note of Article 5.3(g) of the Draft Convention, Van den Berg explains the idea to provide the balanced solution between the discretionary nature of Article 5.1(e) and abandonment of NY Convention in favor of national laws not recognizing annulment as a ground for refusal of enforcement at all. [65]

2.1.2. Relationship between Geneva Convention and New York Convention in Treatment of Vacated Foreign Arbitral Awards

Having determined clear guidance for enforcing courts how to treat vacated arbitral awards, draftsmen went further and regulated the relationship between Article 5.1(e) and Geneva Convention in Article 9.2. Since Geneva Convention represents more specific international treaty binding on much limited number of member states compared to NY Convention, Article 9.2 logically limits application of 5.1(e) to the cases of annulments invoking grounds enumerated in the preceding paragraph of the same article.

The interplay between NY and Geneva Conventions was further clarified in 1993 decision of the Supreme Court of Austria regarding the enforcement of arbitral award rendered by the Foreign Trade Arbitration Court at the Yugoslav Chamber of Economy in Belgrade against Slovenian company. [66] Enforcing the arbitral award set aside by the Slovenian court, Oberster Gerichtshof (OGH) (Supreme Court) of Austria emphasized on the irrelevance of existing broader grounds for refusing of enforcement under NY Convention in relation to the awards governed by Geneva Convention. [67]

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65 Albert Jan van den Berg, *Explanatory Note to the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, ¶ 92 (2008), *available at:* http://www.newyorkconvention.org/userfiles/documenten/draft-convention/64_explanatory.pdf (last visited Mar. 26, 2011).

66 Oberster Gerichtshof [OGH] [Supreme Court] [Aust.] Oct. 20, 1993 *in* 20 Y.B. COM. ARB. 1051 (Van den Berg ed., 1995).

67 *Id.* ¶ 2.

From the practical point of view, we should also note that since Geneva Convention does not provide enforcement regime for foreign arbitral awards, parties seeking recognition of the awards subject to both conventions might need to rely on inter-complementary application of the instruments on enforcement stage. [68] In that case, party seeking to enforce the award subject to both conventions must demonstrate that conditions of both instruments are satisfied. [69]

2.2. Ciments Francais v. Sibirskii Cement –Overlapping Coverage of New York and Geneva Conventions and Destiny of Vacated Arbitral Award in the Russian Federation

Understanding interplay between Geneva and NY Conventions in treatment of vacated arbitral award is of crucial importance in the countries where both instruments are applicable. One of the remarkable examples highlighting problems related to the matter was generated in the first enforcement action involving annulled arbitral award in the Russian Federation in case of *Ciments Français v. Sibirskii Cement* [70]. Since we will be analyzing the treatment of Russian annulment judgments on western European enforcement forums later in this thesis, detail discussion of the run of annulled foreign arbitral award in Russia is necessary to have a better understanding of the standing of the country in the system of international recognition and enforcement of vacated foreign arbitral awards.

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[68] PHILLIPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 288 (1999).

[69] Nikolaus Pitkowitz, *Issues Specific to Arbitration in Europe, Is there Still a Scope of Application of the European Convention on International Commercial Arbitration?*, 2013 AUST. Y.B. COM. ARB. 93, 95 (Christian Klausegger, Peter Klein, et al. eds., 2013).

[70] Ciments Français v. OAO Kholdingovaia Kompaniia Sibirskii Cement, Arbitrazhnyi Sud Kemerovskoi Oblasti [Arbitration Court of Kemerovo Region] Jul. 20, 2011, case no. A27-781/2011, unofficial translation in English is *available at:* http://arbitration.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fmsword&blobkey=id&blobtable=MungoBlobs&blobwhere=1247309505764&ssbinary=true (last visited Mar. 26, 2013); original text in Russian is *available at:* http://kad.arbitr.ru/PdfDocument/ebeeab0f-98d9-4b3b-ba28-d4e99240e21d/A27-781-2011_20110720_Opredelenie.pdf (last visited Mar. 26, 2013).

2.2.1. Background of the Dispute

The case involves French company Ciments Français (CimFra), Russian company OAO Kholdingovaia Kompaniia Sibirskii Cement (SibCem) and Turkish company İstanbul Çimento Yatırımları Anonim Şirketi. Dispute between the parties related to the Share Purchase Agreement (hereinafter SPA) executed on March 26, 2008. [71] Based on SPA, on March 31, 2008 SibCem paid to CimFra € 50,000,000 as an initial payment.[72] However, on October 21 2008, CimFra notified SibCem that due to the failure of the latter to transfer the shares as agreed under SPA, it deemed SPA as lawfully terminated and was planning to retain the initial payment. [73]

Disagreement between the parties as to the termination of SPA led to ICC arbitration in Istanbul, Turkey. The tribunal had to rule on the claim of CimFra asking for approval of validity of termination of SPA and its entitlement to initial payment [74] and counter-claim of SibCem on declaration of the breach of SPA by CimFra and its obligation to repay the initial payment. [75] In the partial award of December 7, 2010 (hereinafter the Partial Award) arbitral tribunal decided that SPA was validly concluded and then terminated by CimFra having right to retain the initial payment made by SibCem. [76]

2.2.2. Setting aside of arbitral award by Turkish Court

Sibirskii Cement successfully challenged the Partial Award in Turkish court. On May 31, 2011 the Second Court of First Instance of the Kadikoy District set the Partial Award aside based on the following grounds:

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71 Dilyara Nigmatullina, *Recognition and Enforcement of Arbitral Awards Annulled in the Forum State (Experience of Russia), in* ARBITRATION IN CIS COUNTRIES - CURRENT ISSUES 156 (2012).

72 *Id.*

73 *Id.*

74 Ciments Français v. Sibirskii Cement, ICC Case No.16240/GZ, Partial Award of December 7, 2010, ¶ 207, *quoted in* Ciments Français v. Sibirskii Cement, *supra* note 70.

75 *Id.* ¶ 209.

76 *Id.* at Sect. V.

1. Arbitral award was made outside of the term established for arbitral proceedings - Article 15.1(c) of the Law no. 4686 of Turkey on International Arbitration [77] (hereinafter Law no. 4686);
2. Arbitral tribunal did not consider argument on the termination of SPA by way of adaption and thus, exceeded its authority – Article 15.1(e) of Law no. 4686;
3. Provisional enforceability of the Partial Award and waiver of the parties to seek annulment of the award was contrary to the public policy of Turkey – Article 15.2(b) of Law no. 4686. [78]

2.2.3. Enforcement of ICC award by Commercial Court of Keremovo Region

After annulment proceedings in Turkey Ciments Français sought enforcement of the Partial Award in the Russian Federation based on Geneva and NY Conventions. On July 20, 2011 Arbitrazhnyi Sud Kemerovskoi Oblasti (hereinafter Keremovo Court) granted enforcement to the Partial award. [79] This was the first case when Russian courts recognized award set aside in the country of origin. [80] Request for recognition and enforcement of the award was filed by CimFra in accordance with Sect. 5 of Arbitrazhno-Protsessualnyi Kodeks Rossiiskoi Federatsii (Arbitration Procedure Code of the Russian Federation) (APK RF). [81] Among other grounds, SibCem challenged enforceability of the Partial Award due to the annulment by

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77 Law of Turkey on International Arbitration, No. 4686, enacted on Jun. 21, 2001 *translated in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Suppl. no. 43, 1-14 (Jan Paulsson ed., 1984, last updated in 2005).

78 Sibirskii Cement v. Ciments Français, Second Court of First Instance of the Kadikoy District, May 31, 2011, Case No. 2011/247, *cited in* Ciments Français v. Sibirskii Cement, *supra* note 70.

79 Ciments Français v. Sibirskii Cement, *supra* note 70, at 11.

80 Dmitry Davydenko, *An Arbitral Award Set Aside "At Home" and then Recognised in Russia*, Oct. 29, 2011, *available at:* http://cisarbitration.com/2011/10/29/an-arbitral-award-set-aside-%E2%80%9Cat-home%E2%80%9D-and-then-recognised-in-russia/ (last visited Mar. 26, 2013).

81 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] (Code of Arbitration Procedure).

Turkish court, constituting ground to refuse enforcement under Article 5.1(e) of NY Convention applicable to the Partial Award. [82]

In assessing the legal force of annulment decision, Keremovo Court first established applicable legal framework, acknowledging the superiority of NY and Geneva Conventions over APK RF as determined in Article 13.4 of APK RF. [83] In the beginning of discussion court emphasized the lack of finality of Turkish court's decision due to the timely appeal by CimFra. [84] Then judge reiterated applicability of Geneva Convention to the enforcement case due to the exhaustive list of grounds for setting aside established under the Convention. [85] Keremovo Court then tested the grounds of setting aside in Turkey against Article 9.1 of Geneva Convention and concluded that neither of the above-described reasons entailed refusal of recognition of arbitral award in the Russian Federation. [86]

As a result, the court granted enforcement of the Partial Award as requested by CimFra.

2.2.4. Denial of enforcement of the Partial Award by Federal Arbitrazh Court for the West-Siberian District

On December 5, 2011 Federal'nii Arbitrazhnii Sud Zapadno-Sibirskogo Okruga (Federal Arbitrazh Court for the West-Siberian District) (hereinafter Siberian Court) denied enforcement of the Partial Award based on the appeal of SibCem. [87] The main argument for refusing of enforcement of the Partial Award was existence of legally binding decision of

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82 Nigmatullina, *supra* note 71, at 157.

83 Ciments Français v. Sibirskii Cement, *supra* note 70, at 11.

84 *Id.* at 12.

85 Mike McClure, *An Unlikely Mix – The Russian Courts, A French Cement Company, and the 1961 European Convention on International Commercial Arbitration*, Kluwer Arbitration Blog, Sept. 28, 2011, *available at:* http://kluwerarbitrationblog.com/blog/2011/09/28/genevaconventio/ (last visited Mar. 26, 2013).

86 Ciments Français v. Sibirskii Cement, *supra* note 70, at 11.

87 Sibirskii Cement v. Ciments Français, Federal'nii Arbitrazhnii Sud Zapadno-Sibirskogo Okruga [Federal Arbitrazh Court for the West-Siberian District] Dec. 5, 2011, case no. A27-781/2011, unofficial translation in English is *available at:* http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=849 (last visited Mar. 26, 2013); original text in Russian is *available at*: http://kad.arbitr.ru/PdfDocument/7f7cbb32-60a7-417b-bc0d-2f49990f185c/A27-781-2011_20111205_Postanovlenie%20kassacii.pdf (last visited Mar. 26, 2013).

Keremovo court invalidating SPA and ordering CimFra to repay the initial payment. [88] Since the decision was already in force by the time of proceedings in Siberian Court, enforcement of arbitral award contradicting binding decision of Russian court would have been against the Russian public policy that is mandatory ground of denial of enforcement under Articles 244.2 and 244.1(7) of APK RF. [89]

Despite the emphasis of the decision on public policy argument, Siberian Court justified its judgment with Article 5.1(e) of NY Convention as well. [90] The court noted that due to appellate proceedings in Turkey, the judicial decision on setting aside was not still in force, but still referred to Article 5.1(e) as the valid ground for refusal of enforcement together with Article 5.1(b) of NY Convention. [91] It should also be noted that judge did not comment on application of Geneva Convention and the elaboration of relationship between the two conventions provided in the decision of Keremovo Court. The ignorance of Geneva Convention resulted in vague application of NY Convention. [92]

2.2.5. Subsequent history of the case in the Russian Federation

In search for recognition of the Partial Award, CimFra referred to Vysshii Arbitrazhnyi Sud RF (VAS) (Highest Arbitration Court of the Russian Federation) asking for supervisory review by the VAS Presidium of the judgment of Siberian Court. In its decision of August 27, 2012, VAS refused supervisory review and upheld ruling of Siberian Court. [93] Despite the fact that CimFra emphasized the misapplication of Article 5.1(e) of NY Convention by

88 *Id.* at 4.
89 *Id.*
90 *Id.* at 5.
91 *Id.*
92 Nigmatullina, *supra* note 71, at 161.
93 Ciments Français v. Sibirskii Cement, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of the Russian Federation] Aug. 27, 2012, case no. VAS - 17458/11, unofficial translation in English is *available at:*http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=1478 (last visited Mar. 26, 2013), original text in Russian is *available at*: http://kad.arbitr.ru/PdfDocument/b22abf52-898b-42f3-9ae3-df43edf10d30/A27-781-2011_20120827_Opredelenie.pdf (last visited Mar. 26, 2013).

Siberian Court in the appeal, [94] VAS did not rule on the issue and limited its analyzes to acknowledgement of proper determination by Siberian Court that recognition of the Partial Award would have violated public policy of the Russian Federation. [95]

As discussed above, the main reason why appellate jurisdictions in the Russian Federation refused recognition of the Partial Award was the judgment of Keremovo Court of August 13, 2010, annulling the SPA concluded between the parties. [96] On June 5, 2012, VAS reviewed the decision and ruled on annulment of the judgment referring the case for anew consideration to Keremovo Court. [97] In its decision of August 31, 2012, Keremovo Court received for anew consideration the case of validity of SPA and started proceedings. [98] While the case is still pending in the court, next hearing is scheduled on March 19, 2013. [99]

As a result of annulment by VAS of the decision of Keremovo Court ruling on invalidity of SPA, CimFra initiated new proceedings in Siberian Court for consideration the request of recognition of the Partial Award anew based on the new circumstances. [100] Apart from the above-cited decision of VAS, CimFra also relied on the decision of Appellate Court of Turkey of March 15, 2012 vacating annulment judgment of Kadykoi Court. [101] Since the case about validity of SPA was still pending in Keremovo Court, Siberian Court refused

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94 *Id.* at 2.

95 *Id.*

96 OAO Kholdingovaia Kompaniia Sibirskii Cement v. Ciments Français, Arbitrazhnyi Sud Kemerovskoi Oblasti [Arbitration Court of Kemerovo Region] Aug. 13, 2010, case no. A27-4626/200, official text in Russian is *available at:*http://kad.arbitr.ru/PdfDocument/7f6f7ec1-3441-4d52-8173-9b8707a133a9/A27-4626-2009_20100813_Reshenija%20i%20postanovlenija.pdf (last visited Mar. 26, 2013).

97 Ciments Français v. Sibirskii Cement, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of the Russian Federation] Jun. 5, 2012, case no. 76/12, official text in Russian is *available at:* http://kad.arbitr.ru/PdfDocument/817c5d30-69ea-424d-947e-b0dca612f5cd/A27-4626-2009_20120605_Reshenija%20i%20postanovlenija.pdf (last visited Mar. 26, 2013).

98 Ciments Français v. Sibirskii Cement, Arbitrazhnyi Sud Kemerovskoi Oblasti [Arbitration Court of Kemerovo Region] Aug. 31, 2012, case no. A27-4626/2009, official text in Russian is *available at:* http://kad.arbitr.ru/Card/03cff142-5c6d-489f-8244-dca1deee8c54 (last visited Mar. 26, 2013).

99 Kartoteka Arbitrazhnyi Deli (Database of Arbitration Cases), case no. A27-4626/2009 http://kad.arbitr.ru/Card/03cff142-5c6d-489f-8244-dca1deee8c54 (last visited Mar. 26, 2013).

100 Ciments Français v. Sibirskii Cement, Federal'nii Arbitrazhnii Sud Zapadno-Sibirskogo Okruga [Federal Arbitrazh Court for the West-Siberian District] Sept. 27, 2012, case no. A27-781/2011.

101 Division of Civil Cases of No. 11 Appellate Court of Republic of Turkey, Mar. 15, 2012, case no. 2012/3915, *cited in* Ciments Français v. Sibirskii Cement, *supra* note 100, at 3.

recognition of the Partial Award once again due to conflict with public policy of the Russian Federation. [102] The decision of Siberian Court was upheld by VAS refusing supervisory review of the judgment on December 19, 2012. [103]

[102] Ciments Français v. Sibirskii Cement, Federal'nii Arbitrazhnii Sud Zapadno-Sibirskogo Okruga [Federal Arbitrazh Court for the West-Siberian District] Nov. 8, 2012, case no. A27-781/2011, original text in Russian is *available at:* http://kad.arbitr.ru/PdfDocument/84fa0093-e328-487b-bcc3-da8450a3d85c/A27-781-2011_20121108_Opredelenie.pdf (last visited Mar. 26, 2013).

[103] Ciments Français v. Sibirskii Cement, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of the Russian Federation] Dec. 19, 2012, case no. VAS – 17458/11, official text in Russian is *available at:* http://kad.arbitr.ru/PdfDocument/8568bf26-4bd2-4a59-b909-ff4d0307e182/A27-781-2011_20121219_Opredelenie.pdf (last visited Mar. 26, 2013).

CHAPTER 3. TREATMENT OF VACATED FOREIGN ARBITRAL AWARDS IN THE UNITED STATES

Out of the contracting states to NY Convention, the United States represents one of the jurisdictions where decision on the recognition of foreign vacated arbitral awards is left on courts without further specific domestic regulatory guidance. We decided to dedicate the foregoing chapter to the analyzes of development of US statutory and decisional law in order to identify the review criteria appropriate for US courts deciding issue of enforcement of vacated arbitral awards.

Beginning with international legal instruments on recognition of foreign vacated arbitral awards, we will firstly, analyze interplay between Inter-American and NY Conventions in force in the US (sect. 3.1), secondly, inter-relationship between FAA and NY Convention (sect. 3.2), thirdly, development of US decisional law in treatment of vacated foreign arbitral awards (sect. 3.3) and lastly, review criteria appropriate for US courts dealing with the annulled arbitral awards brought for recognition (sect. 3.4).

3.1. Article 5.1(e) of Inter-American Convention on International Commercial Arbitration

In order to establish full legal basis for understanding treatment of such awards in the United States representing major focus of the foregoing thesis, present section will be dedicated to Inter-American Convention on International Commercial Arbitration (hereinafter Panama Convention), [104] representing multilateral treaty on enforcement of foreign arbitral awards in force in 19 Latin American countries, including United States, Argentina, Brazil and Venezuela.

[104] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245.

To begin with, we should mention that Panama Convention was drafted in a way to be fully compatible with NY Convention resulting in overlapping coverage of the two instruments particularly because the grounds for refusing of enforcement are almost identical. [105] Before turning to examination of specific solutions employed by major contracting states, we should note that Article 7 of NY Convention itself reiterates the legal force of existing conventions while stating that "the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements".

United States resolves the conflict between the two Conventions by § 305 of the Federal Arbitration Act (FAA). [106] The provision expressly states that if the majority of the parties of arbitration agreement are citizens of contracting states of Panama Convention, the latter shall take precedence over NY Convention, while in all other cases, NY Convention would apply.

As a preliminary point, we should also emphasize that Panama Convention does not contain more favorable national law provision comparable to Article 7.1 of NY Convention. As a result, if the Convention is applicable instead of NY Convention to the proceedings of enforcement of vacated arbitral awards, issue of application of domestic FAA rules would never arise. [107] According to Bowman, omitting the possibility for national courts to apply the domestic law to international arbitral awards, " . . . Panama Convention offers less support to the proponents of de-localized arbitration and a-national awards than the NY Convention." [108]

Relationship between Panama and NY Conventions was further clarified by the US district court in *TermoRio v. Electranta* [109] where judge had to decide which of those two Conventions was applicable to the request for enforcement of vacated arbitral award. Despite

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105 JOHN BOWMAN, THE PANAMA CONVENTION and its IMPLEMENTATION UNDER the FEDERAL ARBITRATION ACT 54 (2002).

106 Federal Arbitration Act, 9 U.S.C. § 1 (1925).

107 Ved P. Nanda, David K. Pansius, *Chapter 19. Recognition of Foreign Arbitral Awards Under the New York Convention*, 3 Litigation of International Disputes in U.S. Courts § 19:40 (2013).

108 Bowman, *supra* note 105, at 61.

109 TermoRio S.A. E.S.P. v. Electranta S.A. E.S.P., 421 F.Supp.2d 87 (D.D.C. Mar. 17, 2006).

the fact that home countries of both parties, US and Columbia, were the contracting states to Panama Convention that made the latter applicable under Article § 305.1, because the relevant provisions of the Panama Convention and the New York Convention were substantively identical, the court found it unnecessary to discuss the former at all. [110]

3.2. Interplay between Federal Arbitration Act and New York Convention in Treatment of Vacated Foreign Arbitral Awards

Once we discussed the relation between the two international conventions applicable in the United States, we can now move on interplay between FAA and NY Convention in order to identify whether domestic FAA avenue is available for NY Convention arbitral awards set aside in the country of origin and brought for enforcement in the United States.

Statutory scheme for enforcement of foreign arbitral awards in the United States is comprised of interplay between domestic FAA provisions (Chapter 1), NY Convention (Chapter 2) and Panama Convention (Chapter 3). [111] Chapter 2 of FAA establishes enforceability of NY Convention in the US in accordance with the provisions enshrined in the chapter. [112] Acknowledging full application of NY Convention, § 208 of FAA rules on residual application of Chapter 1 to NY Convention actions " . . . to the extent that chapter [1] is not in conflict with this chapter [2] or the Convention as ratified by the United States. " Based on the provisions, the decisive question to be answered while determining applicability of domestic FAA to enforcement of vacated NY Convention awards is whether recognition of such awards under FAA would contradict NY Convention. [113]

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110 *Id.*at fn. 4.

111 Edward G. Kehoe,*The Enforcement of Arbitral Awards against Foreign Sovereigns - the United States, in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 244 (Doak Bishop ed., 2009).

112 9 U.S.C.S § 201.

113 Born, *infra* note 117, at 500.

As an initial point, we should mention that while US courts are authorized to confirm award under NY Convention even if FAA is also applicable, [114] in absence of application of NY Convention and choice of parties US to govern the arbitration, FAA is not applicable to enforcement proceedings either. [115]

Discussion around the question raised above should start with emphasis on pro-enforcement policy of NY Convention and FAA, which supports the possibility for the parties to create more favorable enforcement regime by adding provisions from national avenue for recognition of foreign arbitral awards covered by the Convention. [116]

Out of the different propositions as to the intervention of FAA domestic provisions in the actions of enforcement of NY Convention awards, [117] we will focus on applicability of § 9 to the proceedings, which states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the

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114 *Id.* at 244; Spector v. Torenberg, 852 F.Supp. 201, 205 (S.D.N.Y. 1994); National Educator Corp. v. Martin, no. 93C6247, 1995 WL 622267, at 3 (N.D. IL 1995).

115 Kehoe, *supra* note 111, at 244; see also In re International Bechtel Company Ltd. v. Department of Civil Aviation of the Government of Dubai, 360 F.Supp.2d 136, 138 (D.D.C. 2005).

116 JULIAN D. M. LEW, LOUKAS A. MISTELIS& STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 698 (2003); Southland Corp. V. Keating, 465 U.S. 1, 10 (1984).

117 Gary Born in its commentary on International Commercial Arbitration identifies following procedural avenues for enforcement of international arbitral awards in the United States: "(a) confirm an award subject to the New York Convention under §207 of the FAA; (b) confirm an award subject to the Inter-American Convention under §304 of the FAA; (c) confirm an award that affects foreign commerce under §9 of the FAA; (d) confirm an award against a foreign state under the Foreign Sovereign Immunities Act; (e) vacate an award that affects foreign commerce under §10 of the FAA; (f) vacate an award under the New York or Inter-American Conventions and their US implementing legislation; (g) confirm or vacate an award in state court under state statutory or common law; (h) modify an award in federal court under §11 of the FAA; or (i) convert the award into a foreign money judgment, and enforce it as such under state law." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 881 (2001).

agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

For the purposes of the foregoing thesis, we should highlight that § 9 allows parties seeking enforcement to request confirmation of arbitral award as a court judgment unless one of the grounds for vacating arbitral awards enumerated in § 10 is found. [118] Applicability of § 9 to foreign arbitral awards, since it represents alternative enforcement avenue for NY Convention regime, is widely debated among international arbitration scholars.

One group of commentators represented by Gary Born strongly advocates extension of § 9 to NY Convention awards. [119] In justifying the interpretation of § 9, Born scrutinizes text of § 207 of FAA, which expressly prohibits imposition of any grounds for denial of enforcement of arbitral award other than grounds enumerated in NY Convention, but never eliminates possibility to enforce awards through other procedural avenues. [120] The proposition finds its roots in the idea of overlapping coverage of NY Convention and FAA. In fact, 2nd Circuit in *Bergesen v. Muller* found the intent of Congress to establish such kind of parallel application of domestic and international instruments. [121]

Proponents of coverage of foreign awards under § 9 of FAA emphasize that FAA does not require courts to deny enforcement in case of existence of the ground enlisted under the Act, granting the same residual discretion as NY Convention does. [122] If we bear in mind that §207 does not require courts to refuse recognition in case of existence of any grounds

[118] Teresa L. Elliott, *Conflicting Interpretations of the One-Year Requirement on Motions to Confirm Arbitration Awards*, 38 Creighton L. Rev. 661, 667 (2005); § 10 enumerates the following grounds for vacating arbitral awards: fraud, partiality or corruption of the arbitrators, or misconduct by the arbitrators.

[119] Born, *supra* note 117, at 887.

[120] *Id.* at 882.

[121] Bergesen v. Joseph Muller Corp, 710 F.2d. 929, 934-35 (2d Cir. 1983).

[122] Born, *supra* note 117, at 502.

enumerated in Article 5.1(a)-(d) of Convention, but only grants authority to do so, [123] no conflict can exist if the court, relying on Article 7 of NY Convention itself recognizes award with existing refusal ground. [124]

Contrary to the above arguments, other side of the debate points on the venue requirement of § 9 (court designated by the parties or under jurisdiction of which the award was rendered) limiting the provision to domestic awards only. [125] While assessing the approach as "formalistic", commentators, bearing in mind the pro-enforcement bias of NY Convention and FAA, refer to § 204, establishing venue for recognition of foreign arbitral awards in all US district courts, rendering venue argument irrelevant. [126] Moreover, non-exclusivity of venue referred to in § 9 is supported by long-standing US decisional law. In fact, 5th Circuit in *Purdy v. Monex* [127] clarified that § 9, using word "may", merely enables parties to bring case in the district where the award was rendered, but never establish exclusive forum. [128] Moreover, the interpretation of § 9 was shared by 2nd Circuit in *Smiga v. Reynolds*, [129] where the court expressly stated that venue provision is only "permissive", but not "exclusive". [130]

3.3. From Chromalloy to TermoRio – Development of US Decisional Law on the International Effectiveness of Annulled Arbitral Awards

Having established international and domestic legal framework existing in the United States for treatment of vacated foreign arbitral awards, in the present section we will analyze development of US case law in this regard focusing on four cases decided on the matter -

123 Gary H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards - Chromalloy Revisited*, 14 J. INT'L LAW 141–166, at 152 (1997).
124 *Id.* at 152.
125 Kenneth R. Davis, Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 37 Tex. Int'l L.J. 43, 71 (2002); Stephen T. Ostrowski & Yuval Shanya1, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U.L. REV. 1650, 1676 (1998).
126 Davis, *supra* note 125, at 71.
127 Purdy v. Monex International Ltd., 867 F.2d 1521 (5th Cir. 1989).
128 *Id.* at 1523.
129 Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2nd Cir. 1985).
130 *Id.* at 706; Motion Picture Laboratory Technicians Local 780 v. McGregor & Werner, Inc., 804 F.2d 16, 18-19 (2nd Cir. 1986).

Chromalloy (sect. 3.3.1), Baker Marine (sect. 3.3.2), Spier (sect. 3.3.3) and TermoRio (sect. 3.3.4).

3.3.1. Chromalloy Aeroservices v. Government of Egypt – First Encounter with Annulled Foreign Arbitral Award in the US Courts

Application of Article 7 of NY Convention to enforce a foreign arbitral award set aside in the country of origin was firstly introduced by District Court of Columbia in *Chromalloy Aeroservices v. the Arab Republic of Egypt*. [131]

3.3.1.1. Factual Background

The dispute arose between Chromalloy Aeroservices (CAS), a Delaware corporation and Arab Republic of Egypt based on the helicopter service contract of June 16, 1988. [132] The disagreement between the parties led to arbitration in Cairo, Egypt under Egyptian law in accordance with UNCITRAL Arbitration Rules. [133] On August 24, 1994 arbitral tribunal held Egypt liable for termination of contract in violation of the agreed terms. [134]

CAS moved to enforce the award in the US by filing request in the US District Court for the District of Columbia on October 28, 1994. [135] In approximately two weeks after initiating the proceedings for enforcement, Egypt referred to Cairo Court of Appeals for setting aside the Cairo Arbitral Award. [136] Despite the unsuccessful attempt to stay proceedings in District Court, [137] Cairo Court annulled the award on December 5, 1995 based on the alleged failure of the tribunal to apply Egyptian administrative law resulting in breach of choice of law of

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131 In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F.Supp 907 (D.D.C. 1996); Jan Paulsson, *Rediscovering The N.Y. Convention: Further Reflections On Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 20, at 22 (1997).

132 Chromalloy, *supra* note 131, at 909.

133 UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Apr. 28, 1976) *available at:* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (last visited Mar. 26, 2013).

134 Chromalloy, *supra* note 131, at 909.

135 Chromalloy, *supra* note 131, at 908.

136 Minister of Defense v. Chromalloy Aeroservices, Cairo Court of Appeals, Dec. 5, 1995 *in* 24 Y.B. COMM. ARB. 265 (1999).

137 *Id.*

parties. [138] Deviation from the agreement of the parties constituted ground for nullification of arbitral award under Article 53.1(d) of the Egyptian Law of Arbitration. [139]

3.3.1.2. Reasoning of District Court

Judge in Chromalloy granted enforcement primarily based on Article 7 of NY Convention. In the first time in the history of US case-law court relied on Article 7 as an authority enabling the parties seeking enforcement to rely on Chapter 1 of FAA instead of Article 5 of NY Convention since the former provided more favorable treatment for the particular award of the party's concern. Court emphasized on the mandatory wording of Article 7 not to deprive the parties from the rights available on national avenue over the discretionary nature of Article 5.1(e) only authorizing courts to deny enforcement in case of existence of setting aside judgment in the country of origin. [140]

Following the line of argument, the court found the obligation to test the award with the grounds for refusal of recognition prescribed by Chapter 1 of FAA limited to fraud, corruption, bias, procedural misconduct, exceeding the arbitrators' powers or 'manifest disregard of the law'. [141] According to district court, the defect of arbitral award invoked by Egyptian court could have been qualified as mistake of law at worst, which was not ground for refusal of enforcement under Chapter 1 of FAA. [142] As a result, since the grounds enumerated in Chapter 1 of FAA did not mention nullification by situs court at all, the court found the request for confirmation well founded. [143]

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138 *Id.* at 267.

139 Law No. 27 of 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Suppl. no. 19, 1-16 (Jan Paulsson ed., 1984, last updated in 1995).

140 Chromalloy, *supra* note 131, at 910.

141 *Id.* at 912; Sampliner, *supra* note 123, at 144.

142 Chromalloy, *supra* note 131, at 912.

143 *Id.*

District court went further and challenged the value of the judgment of Egyptian court in the US due to the Egyptian anti-arbitration policy. [144] Court found that Egyptian judicial decision violated both " . . . a fundamental U.S. public policy (against detailed substantive judicial review of awards) and the parties' arbitration agreement (which had waived any such review). " [145] More specifically, court found that annulment of arbitral award in breach of no recourse clause included in the arbitration agreement violated US public policy in enforcement of such clauses leaving the annulment decisions out of the deference deserved by foreign judgments. [146]

3.3.1.3. Critique of Chromalloy

Chromalloy decision is criticized mainly for bringing domestic norms into international legal framework by application of Article 7 of New York Convention. [147] While the commentators blame Chromalloy court for encouraging inconsistent application of NY Convention provisions by relying on domestic law, they, nevertheless, admit that the drafters had in mind to sacrifice uniformity for the sake of enforcement while inserting Article 7.1 in the text. [148]

Court's reasoning is criticized by Gharavi for its failure to understand the language of § 9 of FAA referring to the awards made within the jurisdiction of district courts of the US. [149] Commentators emphasize on the difference between Article 1502 of French Code of Civil Procedure (C.P.C.), [150] targeting specifically to international arbitral awards while

144 *Id.* at 915.
145 *Id.*
146 Sampliner, *supra* note 123, at 144; Jonathan I. Blackman, Ellen London, *Respecting Awards Annulled at the Seat of Arbitration: The Road from Chromalloy to TermoRio*, 63-OCT Disp. Resol. J. 70, 74 (2008).
147 Ostrowski, *supra* note 125, at 1669; Thomas Carbonneau, *Debating the Proper Role of National Law Under the New York Arbitration Convention*, 6 Tul. J. Int'l & Comp. L. 277, 279 (1998).
148 *Id.* at 1670.
149 Eric A. Schwartz, *A Comment on Chromalloy: Hilmarton à l'américaine*, 14 J. Int. Arb. 2, 125 (1997); Hamid G. Gharavi, *Legal Inconsistencies of Chromalloy*, 12 Mealey's Int'l Arb. Rep. 21, 22 (1997).
150 Code de procédure civile [C.P.C.] (Fr.), English translation is *available at:* http://www.legifrance.gouv.fr/content/download/1962/13735/version/3/file/Code_39.pdf (last visited Mar. 26, 2013).

enumerating grounds for refusal of recognition more favorable than NY Convention. [151] Despite the clarity of C.P.C. expressly referring to international arbitral awards, §208 of FAA made Chapter 1, including §9, applicable to enforcement of NY Convention awards leaving no ground for exclusion of the provision from Chromalloy case based on its wording solely. [152]

3.3.2. Baker Marine v. Chevron – Chromalloy Abandoned

The issue of applicability of domestic FAA rules to NY Convention award through Article 7 of the Convention was brought down from the shelf three years later after Chromalloy by 2nd Circuit in *Baker Marine v. Chevron*. [153] The court was asked to enforce award rendered by arbitration tribunal in Lagos, Nigeria and vacated by Nigerian court based on the application of losing party. [154]

3.3.2.1. Factual background

The case involves Nigerian oil industry corporations Baker Marine Ltd., Chevron-Nigeria and Chevron Corporation ("Chevron") and Danos and Curole Marine Contractors, Inc. ("Danos"). In 1992, Baker Marine and Danos concluded barge service contract with Chevron under which Baker Marine undertook to provide local support, while Danos was obliged to ensure provision of management and technical equipment. [155]

Once dispute arose due to alleged breach of contract by Danos and Chevron, the parties referred to arbitration panels in Lagos, Nigeria as required by the contract. [156] The two panels dealing with the dispute awarded $2.23 million payable by Danos and $750,000 payable by

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151 Sampliner, *supra* note 123, at 152; The Arab Republic of Egypt v. Chromalloy Aeroservises Inc., Cour d'appel [CA] [regional court of appeal] Paris, Jan. 15, 1997 *in* 22 Y.B. COMM. ARB. 691, 692-93 (1997).

152 *Id.* at 153; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 500 (1994).

153 Baker Marine Ltd. v. Chevron Ltd., 191 F.3d 194 (2nd Cir. 1999).

154 *Id.* at 196.

155 *Id.*

156 *Id.*

Chevron to Baker Marine. [157] Pending the enforcement proceedings initiated by Baker Marine in Nigerian Federal High Court, with the decisions of November 1996 and May 1997, the court annulled the two arbitral awards. [158] The annulment decision of the award issued against Chevron was based on the improper imposition of punitive damages, claiming that arbitrators acted beyond the scope of the party submissions and incorrect admission of parole evidence. [159] On the other hand, the award against Danos was set aside because of the lack of supportive evidence. [160]

In august 1997 Baker Marine requested District Court of Northern District of New York (N.D.N.Y.) to enforce the two Nigerian awards under NY Convention. [161] In the decision before 2nd Circuit, District Court rejected petition referring to NY Convention and requirements of international comity. [162]

3.3.2.2. Chromalloy Distinguished

Based on the appeal of Baker Marine, 2nd Circuit had to decide whether Article 7 of NY Convention allowed petitioner to rely on domestic FAA and request enforcement of awards irrespective of the annulment decisions of Nigerian court. [163] Responding to the request in negative, the court ruled against applicability of Article 7 due to the lack of any link of the dispute with the US law. [164] More specifically, court identified following circumstances discouraging application of domestic law through Article 7.1 of NY Convention: 1. parties contracted in Nigeria; 2. law governing arbitration was Nigerian and 3. there was no reference in the dispute governing agreements to US law. [165] Furthermore, the court noted

157 *Id.* at 197.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.* at 196-97.
164 *Id.* at 198.
165 *Id.*

that " . . . mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments". [166]

Having rejected Baker Marine's argument as to the availability of FAA domestic avenue for recognition of foreign arbitral awards, court moved to consideration whether district court duly exercised its discretion under 5.1(e) of NY Convention while rejecting enforcement due to the annulment decision. In this regard, the court emphasized that due to the failure of appellant to show "adequate reason" for refusing international effectiveness of Nigerian annulment judgments, there was no ground to ignore the decisions under Article 5.1(e). [167]

Supporting the mentioned position as to the discretionary nature of Article 5.1(e), 2nd Circuit distinguished Chromalloy ruling from present case on several facts. [168] Firstly, court highlighted involvement of American company in Chromalloy, while awards in question did not involve any US corporation. [169] Secondly, compared to Chromalloy who sought enforcement primarily in the US, Baker Marine first tried to enforce in Nigeria and only after failure in the country of origin, referred to US courts for recognition. [170] Lastly, court penalized on contract in Chromalloy case expressly prohibiting any appeal or other recourse from the arbitral award. [171] The explicit contractual term resulted in the opinion of Chromalloy court qualifying the annulment in Egypt as repudiation of "its solemn promise to abide by the results of the arbitration". [172] Pointing on the differences, the court distinguished

166 *Id.* at fn. 2.
167 *Id.* at 198.
168 Dana H. Freyer, *United States Recognition and Enforcement of Annulled Foreign Arbitral Awards - The Aftermath of the Chromalloy Case*, 17 J. INT'L ARB. 2, 5 (2000).
169 Baker Marine, *supra* note 153, at fn. 3.
170 *Id.*
171 *Id.*
172 *Id.*

that recognition of Nigerian judgments did not conflict with US public policy, while deference to Egyptian annulment decisions in Chromalloy did. [173]

Despite the fact that Chromalloy is distinguished in footnote 3 of 2nd Circuit's decision regarding Article 5.1(e) only, distinguishing on the nationality of the parties and pointing on American company in Chromalloy can be used as the link required for triggering Article 7 the lack of which is emphasized in the relevant part of ruling.

Though 2nd Circuit mentioned the reliance on comity argument by district court, it never commented on the issue. Leaving out the comity principle maybe understood as hesitation of 2nd Circuit to admit that US courts should grant comity to Nigerian courts. [174]

3.3.3. Chromalloy and Baker Marine tested in Spier

Only two months after Baker Marine decision, S.D.N.Y. ruled against enforceability of foreign arbitral award set aside in Italy in *Spier v. Calzaturificio Tecnica.* [175]

3.3.3.1. Factual Background

The award brought for enforcement in district court was a result of a dispute arising out of the expertise contract concluded between Martin Spier, an American engineer and Calzaturificio Tecnica S.p.A. (hereinafter Tecnica), an Italian corporation in 1969. Following the dispute related to performance of the contract by Tecnica, on October 15, 1985 arbitral tribunal unanimously held in favor of Spier and awarded $672,043 plus interest at the rate of 15% from January 1, 1985. [176]

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173 *Id.*

174 Ved P. Nanda, David K. Pansius, *Chapter 19. Recognition of Foreign Arbitral Awards Under the New York Convention*, 3 Litigation of International Disputes in U.S. Courts § 19:34 (2013).

175 Spier v. Calzaturificio Tecnica S.p.A, 71 F.Supp.2d 279 (S.D.N.Y. Oct. 22, 1999).

176 *Id.* at 281.

In 1985 – 1999, the award was tried before all instances of Italian courts, which finally nullified the award based on the ground that arbitrators exceeded their powers while awarding the compensation to Spier. [177]

3.3.3.2. Evaluation of Chromalloy and Baker Marine by Spier Court

In the renewed proceedings initiated by Spier in district court, judge had to decide on deference deserved by the final judgment of Italian court setting aside the arbitral award brought for enforcement. As in Chromalloy and Baker Marine, the issue of reliability on FAA as more favorable regime for enforcement of annulled arbitral award was present. Having analyzed the interplay between Chromalloy and Baker Marine, judge primarily admitted the resemblance between Chromalloy and present case from the point of fact that US citizen was seeking enforcement of foreign arbitral award. [178] Court then analyzed the above-cited footnote [179] of Baker Marine decision distinguishing Chromalloy and Baker Marine and pointed on the breach of no recourse clause in Chromalloy contract as the decisive factor violating US public policy enshrined in FAA. [180]

Court went further and linked the breach by Egypt of the no recourse clause to the justification of use of domestic enforcement avenue by Chromalloy court, stating that "… the *Chromalloy* district court's reliance upon the FAA to disregard an Egyptian court's decision nullifying an Egyptian award was prompted by a particular circumstance not present in the case at bar: Egypt's blatant disregard of its contractual promise not to appeal an award". [181] It can be concluded from the above described elaboration of district court that reliance on more favorable rights conferred by domestic law under Article 7 of NY Convention can be justified in case of unfair misconduct of the losing party.

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177 *Id.* at 282-83.
178 Spier, *supra* note 175, at 288.
179 Baker Marine, *supra* note 153.
180 Spier, *supra* note 175, at 288.
181 *Id.* at 289.

Spier court word-by-word followed Baker Marine in holding that no reference to US law by parties contracting in Italy precluded application of domestic FAA rules to enforcement of award. [182] The court also reiterated the threshold required by 2nd circuit for the parties requesting enforcement of vacated awards to show "adequate reason" for disregarding annulment decision. [183]

Interestingly, despite Baker Marine and Spier courts believed that the reason triggering application of domestic FAA rules to Egyptian annulled award was the breach of no recourse clause by Egypt, Chromalloy decision does not seem to rely on that ground while justifying application of Article 7.

Both, Spier and Baker Marine courts in fact justified reliance on domestic law while enforcing foreign award in case of breach of no recourse clause by the losing party. [184] Putting so much emphasis on the particular fact of the case is argued to be a weak distinguishing policy employed by the courts, since no recourse clauses never preclude application for setting aside or resisting enforcement. [185]

3.3.4. TermoRio v. Electranta – last proof of misfortune of vacated arbitral awards in the United States

TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P. is the most recent case tried in the United States, dealing with recognition of foreign arbitral awards set aside in the country of origin. [186] The case contains judicial analyzes of all three previously discussed cases and application of case-law to the particular issue of deference deserved by Colombian annulment decision in the US.

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182 Spier, *supra* note 175, at 289.
183 *Id.*
184 *Id.*
185 Nanda, *supra* note 174.
186 TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P. 421 F.Supp.2d 87 (D.D.C. Mar. 17, 2006).

3.3.4.1. Factual background

TermoRio S.A. was Columbian corporation providing public utility services held by LeasoCo Group LLC an Oregon corporation, while the defendant Electrificadora del Atlantico S.A. (hereinafter Electranta) was a private company held by the Republic of Columbia. [187]

The dispute related to the Power Purchase Agreement (PPA) executed between TermoRio and Electranta in June 1997. [188] According to the agreement, TermoRio had to produce and Electranta had to buy power resulting in investment of $7 million in power plant construction for TermoRio. [189]

In March 1998, through the privatization policy carried out by the Republic of Columbia, all the assets of Electranta was transferred to newly formed legal entity Electrocaribe without transferring its obligations to buy power from TermoRio. As a result, Electranta became unable to perform under the Power Sale Agreement. [190] The alleged breach of the agreement resulted in arbitration in Columbia. On December 21, 2000 the tribunal ruled in favor of TermoRio awarding $60.3 million payable by Electranta. [191]

In order to understand the real standing of the case in the system of international arbitration, we should overview the investment environment existing in Colombia in 1990s. In 1990s Colombian government introduced the reform in the sector of public utilities in order to ensure more efficient management of the utility services rendered in the country. For this purpose, Columbia allowed private sector involvement in public utilities with retaining power to plan and regulate the sector on governmental level. [192] Within six months after execution

[187] *Id.* at 90.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] Paola Morales Torrado, *Political Risk Insurance and Breach of Contract Coverage: How the Intervention*

of PPA, Colombian government started energy sector privatization process aiming to increase efficiency of power distribution in the country. [193] The privatization involved capitalization of Corelca S.A. E.S.P., majority shareholder of Electranta, liquidation of Electranta and transfer of Electranta's assets to newly formed company Electricaribe S.A. E.S.P. [194] Facing the threat of losing the investment, TermoRio proposed execution of new agreement with the same terms obliging Electricaribe to buy the produced power as determined under PPA. [195] Despite the promise of Electranta to register the new agreement, subsequent liquidation of the company triggered arbitration. [196]

3.3.4.2. TermoRio Court Revisits Chromalloy, Baker Marine and Spier

District Court addressed all three above described cases in turn and elaborated the applicability of case law to TermoRio's petition. TermoRio court started its legal analyzes by discussing applicability of Chromalloy precedent to TermoRio's claim, qualifying the decision as "both, questionable on merits and distinguishable on facts". [197] Similarly to Spier understanding, TermoRio court put a decisive emphasis on American nationality of Chromalloy as a circumstance triggering application of domestic FAA rules. [198] Having highlighted the lack of US party as a factor diminishing US interest in applying US law, court moved to penalizing on the lack of subject matter jurisdiction based on Foreign Sovereign Immunities Act (FSIA), [199] preventing application of FAA even if that was possible. [200]

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of Domestic Courts May Prevent Investors from Claiming Insurance, 17 PACE INT'L L. REV. 301, 327 (2005), *available at*: http://digitalcommons.pace.edu/pilr/vol17/iss2/7 (last visited Mar. 26, 2013).

193 *Id.* at 329.

194 *Id.* at 330.

195 *Id.*

196 *Id.*

197 *Id.* at 99.

198 *Id.* at 100.

199 Foreign Sovereign Immunities Act of 1976 § 1330, 28 U.S.C.A. § 1330 (2012).

200 TermoRio, *supra* note 186, at 100.

Based on the commentators' observations, we can conclude that D.C. court was ready to expressly disapprove Chromalloy if it was necessary. [201]

As Baker Marine and Spier courts did, judge distinguished Chromalloy on the ground of absence of no recourse clause in PPA. [202] And lastly, court mentioned the priority of firs-filed suits in international context requiring higher level of deference to the enforcement claims brought before the annulment claims in the country of origin as it was a case in Chromalloy. [203]

After casting doubt as to the relevance of Chromalloy decision, district court showed the favor for Baker Marine as a decision "more on point" [204] and emphasized on 2nd Circuit's distinguishing of Chromalloy on the grounds of absence of US citizenship and no recourse clause. [205] In conclusion of case-law review, district judge cited Spier to show the importance of the absence of no recourse clause and burden of petitioner to show "adequate reason" for ignorance of setting aside decision. [206]

3.3.4.3. Application of case-law to TermoRio

According to district court, the only possibility for TermoRio to get the arbitral award recognized in the US was to prove the inconsistency of Colombian annulment decision with US public policy as being "… repugnant to fundamental notions of what is decent and just in the State where enforcement is sought". [207] In testing Colombian judiciary with US public policy, court relied on litigation pursued by petitioner in Colombia as a proof of trust TermoRio had in Colombian courts. [208]

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201 Blackman & London, *supra* note 146, 75.
202 TermoRio, *supra* note 186, at 100.
203 *Id.*
204 *Id.*
205 *Id.* at 101.
206 *Id.*
207 *Id.* at 102; Blackman & London, *supra* note 146, at 75.
208 TermoRio, *supra* note 186, at 102.

Court then tested the declaration of Fernando Mantilla-Serrando, a Columbian lawyer also licensed to practice in New York, France, and Spain. In the declaration, Mantilla explained that Colombian decision qualifying arbitration agreement as having 'illegal object or purpose' solely because of incorporation ICC Rules, in breach of Colombian law, was against US public policy. [209] Nevertheless, Court found the review standard applied by Colombian court annulling award because of reference to ICC rules not "repugnant" enough to dishonor foreign court judgment. [210] Finally, the lack of evidence that Colombian court was corrupt added to the unconvincing allegation as to the decision-determined approach of Colombian court made district court believe that there was no reason for ignoring annulment decision. [211]

Based on the analyzes of development of case-law, we can conclude that enforcement of foreign annulled arbitral award is only feasible in case of contradiction of annulment judgment with US public policy. [212] Furthermore, the emphasis made by the courts on the nationality of the parties is the pattern that led Gharavi to cast doubt as to the favoritism of US courts to US nationals. [213] Finally, reliance of all four courts on the breach of no recourse clause should be further analyzed. As explained by Gharavi, the no recourse clause "does not seem to foreclose all judicial review of arbitral awards such as by an action to set aside at the seat of arbitration or by means of the defenses to enforcement under the NY Convention". [214]

3.3. Focus on foreign court judgment – scrutiny criteria appropriate for recognizing the international effect of foreign setting aside judgments in the US

Having analyzed the four decisions of US courts regarding recognition of annulled NY Convention awards, we can identify the general line of reasoning. In all three decisions

[209] *Id.* at 103.
[210] *Id.*
[211] *Id.*
[212] Blackman & London, *supra* note 146, at 75.
[213] Gharavi, *supra* note 149, at 21.
[214] *Id.*

analyzing Chromalloy, courts emphasized the need for petitioner to show "adequate reason" for disregarding foreign annulment judgments in order to break through in enforcement proceedings. [215] It is evident that the destiny of annulled arbitral awards in the US enforcement avenue is very much depended on the acceptance of annulling judgments for the perspectives of US public policy.

Court in TermoRio relied on the lack of evidence on corruptness of Colombian court as additional ground to grant deference to annulment judgments. [216] In fact, corruptness and bias of court is introduced by William Park as one of the ground for disregarding annulment decisions. [217] It is suggested that reliance on the corruptness of court as a standard while testing annulment judgments may impose unreasonably high burden of proof on petitioner due to the reluctance of courts to honor the ground unless the indisputable evidence is provided. [218]

Based on the US case-law and statutory regime, commentators suggest that foreign annulment judgments shall be tested against the lack of jurisdiction, procedural due process, corruption, bias or violation of public policy. [219] On the other hand, foreign judgments nullifying arbitral awards in any event represent the rejection of the intent of parties to have disputes adjudicated by arbitral tribunals and thus, deserve the less deference compared to judgments that serve as a primary settlement of merits of the dispute. [220] In search for balance between the due deference to the authority of courts of country of origin and interests of parties acting in international arbitration regime, Sampliner suggests the review standard when enforcement courts assess not only the compliance of annulment judgment with public

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215 Baker Marine, *supra* note 153, at 198; Spier, *supra* note 175, at 289; TermoRio, *supra* note 186, at 101.
216 TermoRio, *supra* note 186, at 103.
217 Wiliam W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l and comparative L.Q. 21, at 27-28 (1983).
218 Sampliner, *supra* note 123, at 159.
219 *Id.* at 161.
220 *Id.*

policy, level of corruptness or bias, but also whether they are "clearly erroneous" or arbitrary. [221]

Compared to the solution suggested by Sampliner, Paulsson looks for reliance on difference between international v. local standards annulments. [222] Paulsson advocates the deference to the judgments relying on the grounds enumerated in 5.1(a)-(d) of NY Convention while annulling arbitral awards. [223] Despite the clarity of the proposition, Paulsson's suggestion is questioned in terms of its compliance with the idea of Article 5.1(e) in general. More specifically, permission to refuse recognition of annulled awards would lose its importance if the decisions are to be honored only on the grounds already enumerated in Article 5.1(a)-(d) of the Convention. [224]

Having analyzed the four above-described decisions of US courts, Born highlights the respect US courts have to the primary jurisdictions over arbitral awards. [225] Then Born estimates the circumstances which would deprive foreign annulment decisions from the trust shown in the US previously such as substantive review of arbitral award, particularly when parties waived appeal through no recourse clause in the agreement. [226] Moreover, Born predicts disregard of foreign judgments procedurally tainted or relying on local public policy. [227] Born's emphasis on the internationally accepted annulment grounds, such as grounds enlisted in Article 5.1 reconciles with the idea of Local Standard Annulments, introduced by Paulsson.

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221 *Id.* at 162.
222 Paulsson, *supra* note 131, at 25.
223 *Id.*
224 Sampliner, *supra* note 123, at 162.
225 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 340 (2012).
226 *Id.*
227 *Id.*

CHAPTER 4. CURRENT PECULIARITIES OF RELATIONSHIP BETWEEN EASTERN AND WESTERN EUROPEAN COUNTRIES IN TREATMENT OF VACATED FOREIGN ARBITRAL AWARDS

The last chapter of the foregoing thesis will be dedicated to the current trends in dealing with foreign arbitral awards vacated in the Russian Federation and brought for enforcement in the Netherlands. Our analyzes will be limited to the two cases clearly demonstrating the way Dutch courts treat the foreign annulment decisions trying to gain international effectiveness on the stage of enforcement.

In search for the review criteria applicable in the Netherlands as to the assessment of weight of foreign annulment judgments, we will firstly discuss setting aside and enforcement proceedings generated in Yukos Affair (sect. 4.1), and then analyze case of Maximov v. NLMK, giving further guidance as to the standards and thresholds of Dutch enforcement proceedings (sect. 4.2).

4.1. Legal World War I - Yukos Capital v. Rosneft – Russian Federation and the Netherlands around the issue of enforceability of vacated arbitral award

We have already analyzed international and regional legal framework for recognition of annulled foreign arbitral awards and destiny of such arbitral awards in the United States. As highlighted in the previous chapter, issue of recognition of annulled arbitral awards is mostly connected with the general investment environment surrounding the disputes and triggering the willingness of enforcing courts save or sacrifice arbitral awards seeking for international survival from local annulment proceedings.

Still, international avenue for the vacated foreign awards is active as never in the history of NY Convention. "What we call the "Yukos affair" is actually the world's first legal war in history ..." – over 300 hundred cases in 15 different arbitration courts led Vladimir

Gladyshev, international lawyer practicing in the UK, [228] to make the above qualification about the case that touched upon the crucial points of arbitration and litigation seeking justice from East to West for years. In order to give Gladyshev's statement better standing, we should mention that Yukos Affair produced the largest bankruptcy case ever filed in the United States as stated by judge Clarke *In re Yukos Oil Company* . [229]

Among the hundreds of cases in different jurisdictions regarding different legal issues, Yukos Affair generated one of the recent case involving ICAC arbitral awards annulled in the Russian Federation and brought for enforcement in the Netherlands. [230]

4.1.1. Background of the dispute

Parties involved in the case are Luxemburg based Yukos Capital s.a.r.l. (hereinafter Yukos Capital) and Russian company OAO Rosneft (hereinafter Rosneft). Dispute arose based on the Loan Agreements concluded in July and August of 2004 between Yukos and OAO Yuganskneftegaz (hereinafter YNG), the shares of which was lately acquired by Rosneft. [231]

At the time of conclusion of the Loan Agreements, both companies represented part of Yukos Group. On 19 December 2004, as a result of public auction following the tax assessments imposed on Yukos Oil Company (hereinafter Yukos Oil), shares owned by Yukos Oil (member of Yukos Group) in YNG was sold to Baikal Finance Group (hereinafter Baikal), Russian company incorporated only a week before the auction. [232] Five days later after the

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228 Vladimir Gladyshev interview with Radio Liberty *cited in Russia to pay compensation in $60 billion Yukos case*, TV-Novosti, Jul. 26, 2012 http://rt.com/business/russia-pay-compensation-yukos-131/ (last visited Mar. 26, 2013).

229 In re *Yukos Oil Company*, 321 B.R. 396, 400 (Bankr. S.D. Tex. Feb. 24, 2005).

230 Yukos Capital v. Rosneft, HoF Amsterdam, Apr. 28 2009, unofficial translation in English is *available at:* http://www.iiiglobal.org/component/jdownloads/finish/170/4135.html (last visited Mar. 26, 2013), original text in Dutch is available at http://zoeken.rechtspraak.nl/ (LJN: BI2451); the case is also *reported in* 34 Y.B. COM. ARB. 703-714 (2009).

231 *Id.* ¶¶ 2.1.1, 2.1.3.

232 *Id.*

acquisition, all the shares of YNG, assessed as "crown jewel" [233] of Yukos, constituting 60% of its assets, was transferred by Baikal to Rosneft, oil and gas company owned by the Russian Federation. [234]

Following the alleged breach of the Loan Agreements by YNG, on December 27, 2005 Yukos initiated four arbitration proceedings at the ICAC, Moscow against YNG. [235] On September 19, 2006, ICAC arbitration tribunal awarded 13 billion ruble to Yukos by the virtue of four arbitral awards. [236] Within a month after issuance of the arbitral awards, YNG merged with Rosneft and the latter became a debtor for payment awarded sum to Yukos. [237]

4.1.2. Annulment proceedings in the Russian Federation

In search for prevention of enforcement proceedings initiated by Yukos in the Netherlands, Rosneft applied to Russian courts to set aside the four arbitral awards issued by ICAC. [238] On May 18 and 23, 2007 Arbitrazhnii Sud Moskovskoi Oblasti (Arbitration Court of Moscow District) set aside the awards, followed by upholding decisions of the Federal'nii Arbitrazhnii Sud Moskovskovo Okruga (Federal Arbitration Court of Moscow Region) on August 13, 2007 and Vysshii Arbitrazhnyi Sud RF (Highest Arbitration Court of RF) on December 10, 2007. [239] Among other factors, Russian courts annulling the awards relied on the fact that managing partner of the law firm representing Yukos failed to disclose participation of arbitrators in the conferences organized by the firm. [240] Moreover, Russian courts found "the

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233 Jill Dougherty, *Moscow to Auction Yukos* Unit, CNN (Nov. 19, 2004), http://edition.cnn.com/2004/BUSINESS/11/19/russia.yukos/index.html (last visited Mar. 26, 2013).
234 Yukos, *supra* note 230, ¶ 2.1.3.
235 *Id.* ¶ 2.1.4.
236 *Id.*
237 *Id.* ¶ 2.1.5.
238 *Id.* ¶ 2.1.7.
239 *Id.*
240 Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 35 (2009).

contracts between Yukos Capital and YNG to be part of an unlawful tax avoidance scheme". [241]

4.1.3. Deficiencies of Russian setting aside proceedings justifying disregard of the annulling court judgment

On March 9, 2007, Yukos petitioned Rb. Amsterdam (Amsterdam Court of First Instance) to recognize and enforce the ICAC awards rendered against Rosneft. [242] In its decision of February 28, 2008, the President of Rb. Amsterdam denied the petition based Article 5.1(e) of NY Convention since the awards were annulled in the Russian Federation. [243] In the appeal of the decision, Hof. Amsterdam (Amsterdam Court of Appeals) had to decide whether the annulment decisions of Russian courts precluded recognition of awards in the Netherlands. [244] Responding the question in negative, Hof. Amsterdam firstly emphasized that nothing in Article 5.1(e) or other provisions of NY Convention or in any other instrument compelled Dutch courts to recognize the Russian annulment decisions automatically. [245] Giving the criteria for testing foreign annulment decisions, court emphasized that if Russian annulment decisions did not comply with due process requirements and as a result, failed to respect Dutch public policy, they could not serve as a ground for refusing enforcement of presented arbitral awards. [246]

Based on the above proposition, court tested Russian courts with the principles of impartiality and independence as two essential components of due process – criteria appropriate for

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241 Alex Mills, *From Russia with Prejudice? The Act of State Doctrine and the Effect of Foreign Proceedings Setting Aside an Arbitral Award*, 71 C.L.J. 465, 465 (2012).

242 Yukos v. Rosneft, Rb. Amsterdam, Dec. 28, 2008 (Neth.), ¶ 1.1, the original text in Dutch is *available at*: www.rechtspraak.nl LJN BC8150.

243 Yukos, *supra* note 230, ¶ 3.2.

244 *Id.* ¶ 3.3.

245 *Id.* ¶ 3.4.

246 *Id.* ¶¶ 3.5, 3.6.

assessment enforceability of foreign court judgments in the Netherlands. [247] In examining reliability of Russian judiciary, court cited the findings of international organizations as well as press reports and expert opinions discussing the court system in the Russian Federation. More specifically, court referred to the opinions of murdered journalist Anna Politkovskaya [248] and member of the Parliamentary Assembly of the Council of Europe Mrs. Leutheusser-Schnarrenberg, [249] to cast doubt on the independence of Russian courts. Moreover, court cited Corruption Perception Index 2006 [250] of Transparency International to highlight the level of general corruptness of judiciary. [251] Having emphasized on the negative assessments on the level independence of court system in Russia, Hof. Amsterdam mentioned the decisions of courts in the UK, Switzerland and Lithuania hinting on the political motivations of the Russian government prosecuting Yukos high officials. [252] Lastly, the court pointed on the strong connection of Rosneft and Russian state [253] and link between the current case and events surrounding bankruptcy of Yukos Oil Company and detention of Yukos high officials Mikhail Khodorkovsky and Vasily Aleksanyan. [254]

Based on the above considerations, court concluded that "… it is to such extent likely that the Russian civil court decisions annulling the arbitral awards are the outcome of a judicial process that must be deemed partial and dependent, that those decisions cannot be recognized in the Netherlands." [255] Having rejected other arguments of Rosneft based on the provisions

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247 *Id.*; Hans Smit, *Annulment of an Arbitral Award and its Subsequent Enforcement: Two Recent Decisions*, 19 AM. REV. INT'L ARB. 187, 191 (2008).
248 Yukos, *supra* note 230, ¶ 3.8.1.
249 *Id.* ¶ 3.8.2.
250 Corruption Perception Index 2006, Transparency International, http://archive.transparency.org/policy_research/surveys_indices/cpi/2006 (last visited Mar. 26, 2013).
251 *Id.* ¶ 3.8.4.
252 *Id.* ¶¶ 3.8.8, 3.8.9.
253 *Id.* ¶ 3.9.1.
254 *Id.* ¶ 3.9.2.
255 *Id.* ¶ 3.10.

of Article 5.1, Hof. Amsterdam reversed the decision of the Rb. Amsterdam and recognized the four ICAC arbitral awards annulled in the Russian Federation. [256]

4.1.4. Reception of the Decision of Amsterdam Court of Appeals in International Arbitration Scholarship

The first major issue to be analyzed from the decision of Amsterdam Court of Appeals is the threshold for determining the impartiality and independence of forum annulling arbitral award. Hof. Amsterdam based its decision on the facts highlighting the general dependence and partiality of the Russian judiciary, expressly denying the necessity to provide an evidence of partiality or dependence of particular judges adjudicating the specific dispute. [257] In its commentary to the decision, Van den Berg criticizes court for decreasing the burden of proof of impartiality of court to the general assessments of whole court system in the country. [258] Van den Berg also criticizes the decision for the misuse of limited discretionary power granted under Article 5.1(e). He argues that even if there is residual discretionary power of courts implied in the provision, enforcing judge should have respected international annulment grounds invoked by Russian courts. [259]

The ruling is strongly criticized due to the line of reasoning supporting the idea that enforceability of Russian annulment decisions was pre-requisite for denial of recognition under NY Convention. [260] The approach is blamed, firstly, for contravention with the requirement of NY Convention to deny enforcement in case of annulment decision [261] and secondly, for the threat to uniformity derived from the local standards of impartiality and

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256 *Id.* ¶ 4.1.

257 Yukos, *supra* note 230, ¶ 3.9.4; *see also,* Houtte, Wilske &Young, *What's New In European Arbitration?*, 64-JUL DISP. RESOL. J. 12, 12-13 (2009).

258 Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam,* April 28, 2009, 27 J. INT'L ARB. 179, 180-81 (2010).

259 *Id.* at 189.

260 *Id.* at 190-91.

261 *Id.*

independence applied to such judgments by enforcement courts. [262] Interestingly, Van den Berg cites Baker Marine test calling for "extraordinary circumstances" to justify disregard of the annulment decisions and criticizes Hof. Amsterdam for its failure to look for such circumstances in Yukos case. [263]

4.2. Nikolai Maximov v. NLMK – Second Legal World War

In order to create better understanding of Dutch enforcement standards applicable to annulled arbitral awards, the foregoing section will analyze case still pending in Amsterdam Court of Appeals initiated by Nikolai Maximov searching for enforcement of ICAC award set aside in the Russian Federation. Apart from involvement of two jurisdictions of our particular interest, the case revisits decision of Hof. Amsterdam in Yukos case and demonstrates the reception of the standards established by Yukos court in Dutch judiciary.

4.2.1. Background of the dispute

The case involves Nikolai Viktorovich Maximov, individual residing in the Russian Federation and OAO Novolipetsky Metallurgichesky Kombinat (hereinafter NLMK), steel company registered in the Russian Federation. The dispute arose under the Share Purchase Agreement concluded between Maximov and NLMK on November 22, 2007. [264]

On December 22, 2009 Maximov initiated arbitral proceedings in ICAC requesting payment of remaining purchase price due by NLMK after payment of advance payment of RUR 7,329,840,000.00. [265] In response to the claim, NLMK filed a counter-claim on repayment of advance payment made to Maximov. [266] On March 31, 2011, ICAC arbitration tribunal

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[262] *Id.* at 191.
[263] *Id.* at 192.
[264] Maximov v. NLMK, Rb. Amsterdam, Nov. 17, 2011, (Neth.) *reported in* 37 Y.B. COM. ARB. 274, 275 (Albert Jan van den Berg ed., 2012), original text in Dutch is *available at*: http://zoeken.rechtspraak.nl/ LJN: BV5646 (last visited Mar. 26, 2013) .
[265] *Id.*
[266] *Id.*

awarded Maximov full claim against NLMK and denied counter-claim presented by the latter. [267]

4.2.2. Annulment proceedings in the Russian Federation

On April 7, 2011 NLMK filed application to the Arbitrazhnii Sud Moskovskoi Oblasti (Moscow Arbitration Court) to set aside the ICAC arbitral award. [268] NLMK's annulment claim was based on the allegation that ICAC award was not in compliance with public policy of the Russian Federation, while the composition of arbitral tribunal as well as arbitral proceedings was in breach of the party's agreement. [269]

In its decision of June 21, 2011, Moscow Arbitration Court ruled that failure of arbitrators Zikin and Belikh to disclose the professional relationship with the consultants of Maksimov violated provisions of the Law of the Russian Federation on International Commercial Arbitration and rules of ICAC agreed as rules governing the procedure and thus, constituted the breach of the agreement of the parties. [270] Also, court decided that transfer of shares constituted corporate dispute not arbitrable under the laws of Russian Federation. [271] Lastly, it was decided that method of calculation of purchase price, employed by arbitrators, was not in compliance with mandatory law of Russian Federation, amounting to the violation of Russian public policy. [272]

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267 *Id.*
268 *Id.*
269 OAO NLMK v. Nikolai Maximov, Arbitrazhnii Sud Moskovskoi Oblasti [Arbitration Court of the District of Moscow] Jun. 28, 2011, case no.A40-35844/11-69-311, at 2, original text in Russian is *available at*: http://kad.arbitr.ru/PdfDocument/89d8d955-ab17-444d-99a2-053d667ee9b2/A40-35844-2011_20110628_Reshenija%20i%20postanovlenija.pdf (last visited Mar. 26, 2013).
270 *Id.* at 4.
271 *Id.* at 5-6.
272 *Id.* at 5.

On September 26, 2011, Federal'nii Arbitrazhnii Sud Moskovskoi Okruga (Federal Arbitration Court of Moscow Region) upheld the decision of Arbitration Court. [273] On January 30, 2012, Vysshii Arbitrazhnyi Sud RF (Highest Arbitration Court of the Russian Federation) dismissed the appeal of Maximov. [274]

4.2.3. Enforcement proceedings in the Netherlands

In the process of annulment proceedings going on in the Russian Federation, Maximov sought enforcement of arbitral award in the Netherlands. In its decision of November 17, 2011 Rb. Amsterdam refused recognition of the ICAC award based on Article 5.1(e) of NY Convention. [275] The court relied on the judgment of the Russian courts as a setting aside by competent authority that constituted ground for refusal of recognition. [276] Court of first instance acknowledged the discretion granted under Article 5.1(e) to disregard foreign annulment judgment, but emphasized that the use of the discretion was limited to the exceptional circumstances showing the contradiction of foreign decisions with Dutch standards of due process. [277]

Rb. Amsterdam then determined the threshold standard for burden of petitioner to prove that such deficiencies of foreign annulment decisions were present at the particular proceedings setting aside ICAC award. [278] According to the opinion of the court, failure of Maximov to prove bias or corruptness of Russian courts deciding the issue justified the deference to

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[273] Maximov v. NLMK, Federal'nii Arbitrazhnii Sud Moskovskoi Okruga [Federal Arbitration Court of Moscow Region], Sept. 26, 2011, original text in Russian is *available at*: http://kad.arbitr.ru/PdfDocument/ee92441b-25f8-473f-af61-5083d4459f88/A40-35844-2011_20111010_Reshenija%20i%20postanovlenija.pdf (last visited Mar. 26, 2013).

[274] Maximov v. NLMK, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of Russian Federation], Jan. 30, 2012, original text in Russian is *available at*: http://kad.arbitr.ru/PdfDocument/16f45e55-c2b7-456f-bbaa-d55c37b17fe3/A40-35844-2011_20120130_Opredelenie.pdf (last visited Mar. 26, 2013).

[275] Maximov, *supra* note 264, at 275.

[276] *Id.*

[277] *Id.* at 276.

[278] *Id.*

annulling judgments and thus, denial of enforcement of ICAC award under NY Convention. [279]

Searching for reversal of the decision of the Court of First Instance, Maximov appealed to the Hof. Amsterdam on January 26, 2012. [280] The court followed the line of argumentation developed by the Court of First Instance starting with acknowledgement that ICAC award was annulled by the competent authority in the Russian Federation. [281] Court primarily construed Article 5.1(e) as providing assumption for unenforceability of annulled arbitral awards. [282] Then court determined the possibility to recognize such award as an exception, which "…must be assumed if there are sufficiently strong indications that have been such essential shortcomings in the reversal proceedings before the foreign state court in the case under consideration that it cannot be maintained that the case has been fairly heard". [283]

If we analyze the above quotation of court, we can identify the following elements to be proved by petitioner requesting enforcement of vacated award, such as: 1. Essential shortcomings in the reversal proceedings; 2. The shortcomings must be presented in the particular case concerning arbitral award; 3. The shortcomings must be of the strength to prejudice the fair conduct of case; and 4. The shortcomings must be evidenced with sufficiently strong indications.

Giving the test of exception, Hof. Amsterdam explained exception to the exception rendering the above-criteria inapplicable if "..it is sufficiently plausible that even if the case had been

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279 *Id.*

280 Maximov v. NLMK, Hof. Amsterdam [Court of Appeals], Sept. 8, 2012, case no.200.100.508.01, ¶ 1.1. (Neth.), unofficial translation in English is *available at*: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEIQFjAC&url=http%3A%2F%2Fpravo.ru%2Fstore%2Finterdoc%2Fdoc%2F363%2FBT1201462.pdf&ei=xgswUbHMMdO60AHEm4HwBA&usg=AFQjCNE5j5w3fwqb38JlEiaoiEPP-Yqw-Q&sig2=Rg18LrdwwKmXv7B3fdtxA&bvm=bv.43148975,d.dmQ&cad=rja (last visited Mar. 26, 2013) original text in Dutch is *available at*: http://zoeken.rechtspraak.nl/, case no.200.100.508.01 (last visited Mar. 26, 2013).

281 *Id.* ¶ 2.6.

282 *Id.* ¶ 2.8.

283 *Id.* ¶ 2.9.

heard fairly, the proceedings would have resulted in reversal of the arbitration award". [284] After establishing the clear standard for review of foreign annulment judgments, judge also identified Dutch private international law and case-law of European Court of Human Rights (ECHR) under Article 6 of European Convention of Human Rights [285] as a source requiring application of the above-mentioned standard while treating foreign court judgments. [286]

In applying the above-principles to test Russian judgments, Court referred to the sources cited in Yukos v. Rosneft casting doubt as to the independence and impartiality of the Russian judiciary in general. [287] Nevertheless, court also clarified that exception to the assumption of impartiality and independence of judges can only be established if the evidences "sufficiently specifically relate" to the specific case. [288] Despite the fact that final ruling of the court is still not available, the described judgment already establishes the change of standards of Hof. Amsterdam in assessing impartiality and independence of annulling judgments. Comparing the decision to the decision in Yukos, we can conclude that burden put on Maximov is much higher than burden put on Yukos Capital despite the similarities of the two cases.

Court of Appeals then postponed the case in order to give time to the plaintiff to provide additional evidence. According to the information provided by M.A. Leijten, [289] attorney representing interests of NLMK in Amsterdam Court of Appeals, case is still pending in the court. As noted by Mr. Leijten, the hearings are scheduled in May to discuss further expert statements as required by above-described decision. [290]

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284 *Id.*

285 Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953 213 U.N.T.S. 222.

286 Maximov, *supra* note 280, ¶ 2.9.

287 *Id.* ¶ 2.11.

288 Maximov, *supra* note, ¶ 2.11.

289 Marnix Leijten is a partner at De Brauw Blackstone Westbroek, international law firm that handling NLMK litigation in the Netherlands as indicated on the first page of the Court of Appeals Decision (http://www.debrauw.com/People/Pages/leijtenm.aspx).

290 E-mail interview of Mr. Lejten, date of outlook: 02.28.2012.

CONCLUSION

The thesis provided analyzes of the legal framework and decisional law around the issue of recognition and enforcement of foreign arbitral awards annulled in the country of their origin. Coming from the discretionary nature of Article 5.1(e) of NY Convention and policy of the Convention, enshrined in Article 7, to give precedence to national and international instruments more favorable for enforcement, many countries like France moved the issue out of Convention regime and regulated on domestic level to avoid inconsistency on enforcement stage. We selected jurisdictions with no specific domestic guidance staying in the international regime provided by NY and Geneva Conventions with focus on the United States and the Netherlands in order to identify the standards applicable for exercising discretion granted under NY Convention in treatment of vacated awards brought for enforcement in those countries.

We started the thesis with overview of NY Convention framework and having analyzed legal scholarship around Article 5.1(e), found that while general assumption of unenforceability of vacated awards prevail, recognition of such awards in exceptional circumstances is still accepted. In search for the exceptional circumstances justifying enforcement, focus is mostly made on the international acceptance of grounds relied by courts annulling award and the compliance of the annulment proceedings with general requirements of due process.

Then we moved on determination place of Article 7 of NY Convention in the system of enforcement of vacated awards and found that extensive application of even more pro-enforcement national laws prejudicing uniform application of the Convention does not have much support among arbitration scholars. Nevertheless, ultimate aim of the Convention to save domestic and other international avenues for the parties seeking enforcement is widely recognized. Analyzing the effectiveness of parallel application of NY Convention and more

favorable regimes such as Geneva Convention, we demonstrated the universal recognition of the importance of Geneva Convention limiting international effectiveness of annulment judgments in express treaty terms and the need for the clarity in NY Convention system.

Having established international legal framework in force around the issue, we provided overview of applicable regional and national instruments and decisional law of the United States. As the initial point, we observed general acceptance of residual discretion granted by NY and Panama Conventions to US courts dealing with vacated arbitral awards. Studying all four NY Convention cases involving annulled awards ever decided in the US, we could observe that the main inconsistency in the practice lies not on the understanding of Article 5.1(e), but on the issue of applicability of domestic FAA rules to enforcement of NY Convention awards through Article 7 of the Convention. After recognition of annulled award by D.C. court in Chromalloy based on Chapter 1 of FAA, both, higher and same level courts in the country elaborated the set of circumstances which are capable of triggering US domestic law as more favorable regime for enforcement of vacated awards, such as: 1. Involvement of US national in the dispute; 2. Applicability of US law according to party agreement; 3. US as a first choice of enforcement by the party.

As to the standards for exercising discretionary power granted under Article 5.1 of NY Convention regarding vacated arbitral awards, analyzing of US case law leads us to the conclusion that focus on foreign annulment judgment is the only acceptable way of dealing with such situations. We could identify the task for the party seeking recognition of annulled award in the US to show "adequate reason" for disregarding foreign annulment decisions. Analyzing the development of US case law around the matter, we find that parties seeking enforcement are expected to show grave unfair act of the other party, such as breach of no recourse clause, or corruptness of specific judge annulling the award, or deprivation of the party from due process safeguards rendering the judgments contradictory with US public

policy. Unless the "adequate reason" *i.e.* serious procedural deficiencies of annulling proceedings is demonstrated, US courts should be expected to grant high level of deference to foreign court judgments and refuse recognition of annulled arbitral awards.

Lastly, we analyzed two cases involving ICAC arbitral awards set aside in the Russian Federation and brought for enforcement in the Netherlands. Interestingly, both cases of Yukos and Maximov represent two of the most extensive bunch of litigation ever known in the world with hundreds of disputes in different jurisdictions. In both cases the parties requesting enforcement from Dutch courts were relying on overall corruptness, bias and dependence of the Russian judiciary justifying disregard of the decisions. While in Yukos case, Amsterdam Court of Appeal disregarded annulment decisions of Russian courts based on the general information without requesting any evince on corruptness of specific proceedings, the preliminary decision of the same court in Maximov's case three years later expressly reversed the threshold standard. Despite Maximov's case is still pending, based on the available decision of Court of Appeals, we find that standards of burden of proof are increased compared to situation in 2009. Having a task to identify review criteria appropriate for Dutch courts in treatment of vacated arbitral awards, we find that recognition is possible only in case of exceptional circumstances, which include deprivation of parties from fundamental elements of due process and which must be presented in the particular proceedings resulting in annulment of arbitral award brought for enforcement.

To summarize all the findings of the presented research, in the situation when no clearer international regulation of enforceability of vacated arbitral awards is expected, focus on annulling court judgments should be taken as the methodology appropriate while dealing with the issue. Following the line of reasoning, the most balanced approach taking into account the interests of primary and enforcing jurisdictions should grant deference to annulments relying on internationally recognized grounds and ensuring independent and impartial adjudication of

the process. Despite the international character of arbitration and idea of a-national award, acceptance of primary jurisdiction of countries of origin is the undisputed part of NY Convention and cannot be overturned by any interpretation of Article 5.1.

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